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Supreme Court of the United States

OCTOBER TERM 1958

No. 310

BOSTON AND MAINE RAILROAD; THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY; THE NEW JERSEY AND NEW YORK RAILROAD COMPANY, HORACE BANTA, Trustee; THE LONG ISLAND RAIL ROAD COMPANY,

Appellants,

against

UNITED STATES OF AMERICA; INTERSTATE COMMERCE COMMISSION *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS.

JURISDICTIONAL STATEMENT

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IN THE

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No.....

BOSTON AND MAINE RAILROAD; THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY; THE NEW JERSEY AND NEW YORK RAILROAD COMPANY, HORACE BANTA, Trustee; THE LONG ISLAND RAIL ROAD COMPANY,

Appellants,

against

UNITED STATES OF AMERICA; INTERSTATE COMMERCE COMMISSION; CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY; THE ATCHISON, TOPEKA AND SANTE FE RAILWAY COMPANY; ATLANTIC COAST LINE RAILROAD COMPANY; THE BALTIMORE AND OHIO RAILROAD COMPANY; THE CHESAPEAKE AND OHIO RAILROAD COMPANY; CHICAGO & EASTERN ILLINOIS RAILROAD COMPANY; CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY; CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY; THE DELAWARE AND HUDSON RAILROAD CORPORATION; THE DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY; ERIE RAILROAD COMPANY; GREAT NORTHERN RAILWAY COMPANY; GULF, MOBILE & OHIO RAILROAD COMPANY; ILLINOIS CENTRAL RAILROAD COMPANY; LEHIGH VALLEY RAILROAD COMPANY; LOUISVILLE AND NASHVILLE RAILROAD COMPANY; MINNEAPOLIS, ST. PAUL AND SAULT STE. MARIE RAILROAD COMPANY; MISSOURI PACIFIC RAILROAD COMPANY; NEW YORK CENTRAL RAILROAD COMPANY; THE NEW YORK, CHICAGO AND ST. LOUIS RAILROAD COMPANY; NORFOLK AND WESTERN RAILWAY COMPANY; NORTHERN PACIFIC RAILWAY COMPANY; THE PENNSYLVANIA RAILROAD COMPANY; READING COMPANY; THE ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY; SOUTHERN PACIFIC COMPANY; SOUTHERN RAILWAY COMPANY; TEXAS AND NEW ORLEANS RAILROAD COMPANY; THE TEXAS AND PACIFIC RAILWAY COMPANY; UNION PACIFIC RAILROAD COMPANY; THE VIRGINIAN RAILWAY COMPANY; WABASH RAILROAD COMPANY and WESTERN MARYLAND RAILWAY COMPANY,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS.

JURISDICTIONAL STATEMENT

Appellants appeal from the final judgment of the United States District Court for the District of Massachusetts entered May 5, 1958 setting aside an order of the Interstate Commerce Commission and remanding the cause to the Commission for further proceedings not inconsistent with the majority opinion of the three-judge Court in the respects specified in their notices of appeal, and submit this statement to show that the Supreme Court of the United States has jurisdiction of the appeals and that substantial questions are presented.

OPINIONS BELOW

The majority opinion of the United States District Court for the District of Massachusetts is reported in 162 F. Supp. 289. The dissenting opinion is not reported. Copies of said opinions and of the Judgment of the District Court are set forth in Appendix A hereto. The report of the Interstate Commerce Commission reviewed by the District Court is reported in 297 ICC 291. The proposed report of the Trial Examiner (filed and served on all parties December 8, 1954), referred to in the majority opinion of the District Court, is not reported. Copies of said reports and of the Order of the Commission are set forth in the Supplement to Appendix A hereto, bound separately.

JURISDICTION

This suit was brought in the United States District Court for the District of Massachusetts, under 28 U. S. C. 1336, 1398, 2321-2325; 5 U. S. C. 1009 and 49 U. S. C. 17(9), to set aside an order of the Interstate Commerce Commission. The judgment of the District Court was entered on May 5, 1958 and notices of appeal were filed in that Court

by these appellants* on July 3, 1958. Jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by Title 28 U. S. C. Section 1253. The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case: *United States* v. *Capitol Transit Co.*, 325 U. S. 357; *United States* v. *Detroit and Cleveland Navigation Co.*, 326 U. S. 236; *United States* v. *Pierce Auto Freight Lines*, 327 U. S. 515; *Frozen Food Express* v. *United States*, 351 U. S. 40.

The Appellants are Parties Aggrieved by the Decree from which These Appeals Are Taken and Have Standing to Appeal Therefrom.

Although the final decree of the District Court granted the prayer of the appellants' complaint that the Interstate Commerce Commission order complained of be set aside, the decree also remanded the matter to the Commission "for further proceedings not inconsistent with" the majority opinion of the Court. By this mandate, which in effect incorporated the District Court's opinion in its judgment (see *Gulf Refining Co.* v. *United States*, 269 U. S. 125, 135, 1925), the conclusions reached by the District Court on the legal issues determinative of the questions presented on these appeals became res adjudicata, binding upon appellants not only in any renewed administrative proceedings (see *I. C. C.* v. *Baird*, 194 U. S. 25, 38, 1904; *Fed. Power Comm.* v. *Pac. Company*, 307 U. S. 156, 160, 1939) but in any collateral proceedings between the appellants and the inter-

* The Boston and Maine, The New York, New Haven and Hartford and The New Jersey and New York filed a joint notice of appeal. The Long Island filed a separate notice of appeal identical with that appeal in all respects except that it did not below and does not here assert any violation of the Sherman Act nor associate itself with any presentation hereinafter asserting such violation.

vening railroad defendants (*Seatrain Lines Inc.* v. *Pennsylvania R. Co., et al.*, 207 Fed. 2d 255, 259, C. C. A. 3rd 1953).

The situation here is not comparable to that in *United States* v. *United States Smelting and Refining Co.*, 339 U. S. 186 (1950); the first injunction there was interlocutory only. The decree in this case, although it may not finally determine the administrative proceeding in respect of which it was entered, does finally determine the suit in which it was entered. Any new I. C. C. order would be the subject of a new suit before a District Court, not necessarily even the same Court that determined this cause.

Accordingly, to avoid the impact of the decree as res adjudicata of the issues which were determined adversely to them and incorporated in the decree, the appellants are required, and therefore have standing to, appeal therefrom. *Partmar Corp.* v. *Paramount Corp.*, 347 U. S. 89 (1954).

STATUTES INVOLVED

Administrative Procedure Act: Sections 2, in part (60 Stat. 237 as amended), 4 (60 Stat. 238), 5 (60 Stat. 239) and 9(a) (60 Stat. 242); *Interstate Commerce Act*: Sections 1, pars. 10, 11, 14(a) (40 Stat. 101 as amended), 5a (62 Stat. 472), 13(1) (24 Stat. 383 as amended), 15(2) (34 Stat. 589 as amended) and 16(1) (34 Stat. 590 as amended); *Sherman Act*: Sections 1 and 2 (26 Stat. 209 as amended).

The above statutes are set forth in Appendix B hereto.

QUESTIONS PRESENTED

(All references to the Act and to Sections (§§) in this Jurisdictional Statement are to the Interstate Commerce Act unless otherwise noted)

1. Does the Interstate Commerce Commission have authority to make a declaratory order in this proceeding, under Section 5(d) of the Administrative Procedure Act?

2. Where there has been no Commission action under Section 1(14)(a) regulating car-hire charges, does the Act impose as between carriers, or empower the Commission (otherwise than by rule under Section 1(14)(a)) to impose as between carriers, any obligation with respect to receiving or paying car-hire (other than the obligation imposed by Section 1(4) with respect to the operation of through routes)?

3. If so, does such obligation exceed

(a) in the case of the owner, an obligation not to receive car-hire in an amount which is unreasonably high, or (and)

(b) in the case of the user, an obligation to pay car-hire in an amount which is not unreasonably low?

4. Does the Act require, or empower the Commission to require, uniform observance of car-hire charges not established by the Commission?

5. Should the Commission entertain a proceeding to enforce, or* enter an order enforcing (or providing the basis for enforcing), uniform observance by non-assenting roads of car-hire charges fixed collectively, under an agreement approved by the Commission under Section 5a of the Act, by the owners of a majority of the railroad-owned freight cars?

STATEMENT OF THE CASE

(References to the Record below are given only as to those statements not clear from the District Court's majority opinion, the Commission's report, or the complaint before the Commission.)

The judgment appealed from, entered in a civil action brought by appellants and others as plaintiffs against the

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* The words "entertain a proceeding to enforce, or" appear in this question as presented by the joint appeal of the three appellants first above named, but are omitted from this question in the appeal of the Long Island.

United States and the Interstate Commerce Commission to set aside a Commission order, unanimously vacated an order[1] of the Commission and, one judge dissenting, remanded the matter to the Commission for further proceedings not inconsistent with the majority opinion of the three-judge District Court. The majority held that the Commission had not adequately considered the issue of reasonableness; the dissenting judge did not reach that issue, since in his view the proceedings before the Commission should have been dismissed.

These plaintiffs appeal from this judgment insofar as it adjudges that the Commission has jurisdiction of the proceeding, as to the nature and extent of such jurisdiction, if any, that the Commission's order was not repugnant to or incompatible with §5a of the Interstate Commerce Act, and[2] that the maintenance of the proceeding before it was not incompatible with §§1 and 2 of the Sherman Act, and remands the matter to the Commission for further proceedings accordingly.

The Commission order relates to certain "per diem" charges. Railroad-owned freight cars are on the lines of railroads other than their owners for millions of car-days each year; the car-hire charge paid to the car-owning railroad, customarily calculated on a per-car per-day basis, is known as per diem. The frequently used term "per diem rate" can be misleading, since car-hire is not a rate in

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[1] Entered October 17, 1955 in an adversary proceeding entitled *Chicago, Burlington & Quincy R. Co. et al.* v. *New York, Susquehanna & Western R. Co. et al.*, ICC Docket No. 31358, 297 ICC 291.

[2] Except for the Long Island, as to the matter from here to the comma after "Sherman Act".

the commerce sense,—it is not a tariff nor a charge to shippers for expenses incidental to transportation. Car-hire payments between carriers have no effect upon the freight rate level, nor upon the net income of the railroad industry considered as a unit.

The Commission order gave the declaratory relief requested by the complainant large car-owning railroads which initiated the proceeding. This order, as well as its effect (and that of the remand appealed from), is fully comprehensible only in the light of the controversy and the context in which it was made.

The parties to the controversy before the Commission divide into two groups:

(a) the appellant railroads, plaintiffs in the District Court action, defendants before the Commission, are predominantly traffic-terminating roads, *debtors* on settlement of net car-hire accounts;

(b) the appellee railroads, interveners as defendants in the District Court action, complainants before the Commission, are, in large majority, predominantly traffic-originating roads, *creditors* on settlement of net car-hire accounts.

Railroads acquire freight car ownership primarily to meet the demands of shippers on their lines (R. 842, 55, 576). Consequently, the great majority of the freight cars of this country are owned by roads which originate more traffic than they terminate. For the most part these roads are creditors on settlement of net car-hire accounts. In contrast, the appellants are "terminal" railroads, serving densely populated areas which consume more freight than they originate. The Boston & Maine, for example, ter-

minates three cars for every car it loads outbound (R. 701); the Long Island terminates four times as much traffic as it originates (R. 437). These roads necessarily send back substantial numbers of empties (R. 247, 869, 701).

An obligatory Car Service Rule,[3] designed to relieve commerce of the burden of excessive back-hauling of empty cars, requires every railroad to load available off-line cars for movement in homebound direction in priority to cars of its own. The effect of this Rule is to freeze appellants and other terminal roads in the status of car-hire debtors, with relatively small car-ownerships (R. 868-70, 45-6). As the terminating carriers cannot lawfully refuse to accept whatever cars are delivered to them for further transportation, they have no option to avoid incurring the obligation to pay rental for the cars of other roads (R. 868, 901, 849).

Although under §1(14)(a) the Commission has regulatory power to establish by rule the amount of rental "to be paid" as "compensation" for the use of cars of other roads, it has never exercised that power,—with one exception, when its exercise was set aside on judicial review, as done for a car service regulatory (rather than compensatory) purpose.[4]

Petitions that the Commission establish a car-hire charge by rule under §1(14)(a), filed by some short lines and other carriers in 1946-47, were dismissed by the Commission without its doing so in 1949.[5] Instead, the matter of car-hire has been left to agreement among the carriers, acting in recent years through their organization, the Association of American Railroads (known as the AAR). In

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[3] Quoted in the majority opinion below, Appendix A, p. 11a.

[4] *Palmer* v. *United States*, 75 F. Supp. 63 (D. D. C. 1947).

[5] *Alabama T. & N. R. Co.* v. *Aberdeen & R. R. Co.*, 274 ICC 383 (1949), at 384, 399.

recent years also,[6] agreement among all carriers was obtained without serious dissent until 1946. Disagreement arose when the per diem charge was successively increased from $1.15 to $1.50 in 1947, to $1.75 in 1949, to $2.00 in 1952, and to $2.40 in 1953 (R. 244-5),—a rate of acceleration so much faster than the post-w... increases in freight rates (tariffs) allowed by the Commission that it nullified all their benefit as to the terminal roads, and reduced the net revenues of many of them to less than they were in 1944 (R. 898-902, and chart facing p. 46 of Ex. 53, R. 875-7).

The increases to $2.00 and $2.40 were fixed and put into effect under industry procedures set forth in an agreement between railroads dated April 1, 1950 known as Agreement No. 7, approved by the Commission in February 1950[7] under §5a (known as the Bulwinkle Act, 49 U. S. C. §5b). The earlier $1.75 charge, fixed under a predecessor agreement, was adopted and continued under Agreement No. 7 (Art. IX) until subsequently increased.

Both under Agreement No. 7 and its predecessor, final action on the above-mentioned increases was determined by industry vote. This vote is weighted heavily in favor of the large car-owning roads; each road has as many votes

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[6] As to the earlier period, see Mr. Justice Stone's dissent in *Chicago, R. I. & P. Ry. Co.* v. *United States*, 284 U. S. 80, 1931.

[7] The Commission found that Agreement No. 7 (by Article XII):

> ". . . accords to each party thereto the free and unrestrained right to take independent action either before or after any determination arrived at through procedure established by the agreement; and that approval of the agreement is not prohibited by paragraph . . . (6) of Section 5a."

Association of American Railroads—Agreement, 277 ICC 413, at 425 (1950). Reopened and reconsidered, *Ahnapee & Western R. Co.* v. *Akron & Barberton Belt R. R. Co.*, ICC Docket No. 31774, decided March 7, 1957 by Division 2, 300 ICC 73, and November 12, 1957 by the full Commission, 302 ICC 265.

as it owns cars (R. 248-9, Art. IV of Agreement No. 7). Since at least 1946, majority voting control of the car-hire charge has been vested in a relatively small group of large car-owning railroads. For example in 1952, 23 railroads (most of them complainants or intervenors in their support before the Commission) owned 1,121,225 of the total 1,776,-853 freight cars owned by Class I railroads (Ex. 14, R. 333, 863-4), and thus had over 63% of the total votes. The possession of this power by the per diem creditor roads, coupled with the financial inducement to exercise it, enabled the adoption by majority car-owning vote of the successive proposals for increases in the per diem charge (R. 862-4, 866-7). These proposals originated in the General Committee of the AAR (R. 248).

The AAR General Committee's own minutes and records show that its basic formula of calculation for the $1.50, $1.75, $2.00 and $2.40 charges (R. 335, 117, 119, 152, 78-9) was developed not to find a charge which would reflect accurate car-ownership costs plus a reasonable return on investment, but for the purpose of procuring statistical support for a per diem increase previously agreed upon.[8]

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[8] At its meeting on January 21, 1947, the AAR General Committee determined on the increase to $1.50 (Ex. 40 "Notes of Discussion", pp. 27, 35, R. 823) despite the warning of New York Central's Mr. Dawson that the Committee had nothing "on which to base a $1.50 rate" (*idem*, p. 31). The first "studies" thereafter written up (Ex. 41, esp. last 4 pages, R. 823) fell 18.5¢ short of reaching this goal. Nevertheless, on February 26, 1947, the Committee again voted a prompt increase to $1.50 (Ex. 42, p. 2, R. 824-5). The next "studies" (Ex. 45A, p. 11, R. 1234, 1250) still fell short by 13¢. With further estimates, adjustments, etc., the next "studies" (which reached the General Committee July 17, 1947), showed precise support for $1.50 (Ex. 39, p. 2, R. 801, 823). The General Committee again voted the increase to $1.50 (*ibid.*) and it was promptly put through and made effective September 1, 1947 (R. 245, 82-3, Appendix A, p. 3a).

Less than four months after the Commission in July 1949 dismissed the short lines' petition for Commission regulatory action, the increase to $1.75 was made effective by action of the large car-owning roads (R. 245). To support this increase and the succeeding increases to $2.00 and $2.4[illegible], further successive changes were made in the formula (R. 91, 93-4 & fn. 11, p. 12, *infra*), in each case providing support for a greater increase than would have emerged from application of the previous formula to the "cost" figures of the latest available year.[9] Protests by terminal roads to the AAR (R. 874-5, 877-9) were rejected or ignored (R. 251-2, 878-9, 889-91).

Until 1951 the railroads generally, signers and nonsigners of Agreement No. 7 alike, settled with one another at the rates of charge adopted or determined thereunder. In March 1951, however, the New York, Susquehanna & Western Railroad (which was not a party to Agreement No. 7) served notice that it would no longer pay the $1.75 per diem charge then in effect (pp. 23-34 of Ex. 53, R. 875-7 & R. 882). Instead, it offered to settle its per diem accounts thenceforth on a differently calculated basis, reflecting the cost of the cars in the individual ownership of each road (R. 879-882, 902-8). The Boston and Maine and four other roads accepted the Susquehanna's offer (R. 882-3, 954).

All of the large car-owning roads rejected the offer (R. 883). Virtually all of them also refused or ignored the Susquehanna's subsequent offers to negotiate individual bases of settlement with each road (R. 890) and demanded that the Susquehanna pay the uniform industry-fixed charge, variously terming it "the established rate," "the going rate," "the rate fixed by the AAR" (R. 883). A con-

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[9] See Commission Report, Appendix A, pp. 54a-55a and fn. 11, p. 12, *infra*.

siderable number of them attempted by coercive measures to compel the Susquehanna to pay the industry-fixed charge,[10] but the Susquehanna persisted in its refusal.

To support the increase to $2.40, a further formula change was made which *in itself* added more than $130,000,000 per year to the "costs" reflected in the per diem charge.[11] Eight roads which were subscribers to Agreement No. 7 refused to pay this increase, either withdrawing under Article X or exercising the "right to take independent action" under Article XII, and paid and offered to settle thereafter at $2.00 or other somewhat lower amounts.

As Susquehanna had done, Boston and Maine offered to agree on rental charges with each road individually. The roads which replied declined to enter into any arrangement other than the $2.40 (R. 400). It then made what it thought was "a general generous compromise offer" (R. 400-4, 420-1, 352-5, 409, 422). The complaint before the Commission followed almost at once. The increase to $2.40 was made effective on August 1, 1953 (R. 245). On September 21, 1953, the complaint was filed with the Commission against the Susquehanna and seven of these other non-assenting roads. (The eighth, The New Jersey and New York, was added by subsequent amendment.)

That complaint, complaining of the above refusals, alleged that to the extent that the payments tendered and

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[10] The Louisville & Nashville attempted a boycott (Ex. 54, R. 884-6) which proved abortive; other roads withheld divisions of tariffs due the Susquehanna—in one case over 400 times the amount in dispute, routed traffic around it, altering customers' shipping instructions, etc. (R. 884, 954-5, 891-2, 895, 909-10).

[11] R. 173, 96-7; sheet No. 4 of Ex. 4, R. 69, 219: The difference between lines 13 and 3 ($4,170,742,649) was added to the depreciation base. At 3.12% annually (*idem.* line 20), this added $130,127,170 per year.

offered by these nine roads in settlement of their car-hire accounts were less than the uniform charges which had been fixed under the industry procedures embodied in Agreement No. 7, such payments, tenders and offers "are and would be unjust, unreasonable and noncompensatory, in violation of Paragraphs (4), (10) and (11) of Section 1 of the Act."

The complainants did not seek money damages; as relief they asked that the Commission "find and declare" that the $1.75 and $2.00 per diem charges "during the periods in which these rates were effective" were, and that the $2.40 per diem charge effective August 1, 1953 is "just, reasonable, and otherwise lawful, and that the performance of orderly transportation service by railroad in the public interest requires uniform observance of such rates by defendants together with other carriers."

In their principal brief to the Commission,* the complainants disclaimed any intention to invoke the Commission's regulatory power to establish car-hire charges under §1(14)(a). As the Commission said in its report, "Such action . . . would render the present procedure for dealing with per diem charges inoperative." Instead, they expressly asked "that after settling the present controversy by appropriate findings the Commission should release the subject matter to the industry for private handling"* under the procedures of Agreement No. 7, stating that the Commission findings sought by complainants

> "will be sufficient and effective as the basis for settling outstanding per diem balances and for assuring observance of whatever may be the established rate in the future."*

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* Par. 40 of the complaint in this action, admitted by answer of intervening defendants (par. 25); accuracy of quotations admitted by answer of United States (par. 25).

The Commission granted the relief prayed for. It found and declared

> "... that the per diem charges of $1.75, $2, and $2.40 were not in excess of reasonable compensation during the periods in which they were effective, and that the latter charge is not in excess of reasonable compensation for present use."

after first holding

> "... our finding below specifies the per diem charges which, on the basis of the facts and circumstances before us, could properly be established under Section 1(14)(a). It necessarily follows that lower charges in our judgment would not be compensatory, either at present or in the past."

The order discontinued the proceeding and "made a part [t]hereof" the Commission's report "containing its findings of fact and conclusions thereon." The petition of defendants (plaintiffs-appellants here) for reconsideration, reargument and rehearing was denied July 16, 1956.

The District Court held that the Commission (under §§13(1), 16 and 1(11)) has jurisdiction to determine whether and to what extent the rental prices fixed by collective industry action exceed *the maximum* of what is reasonable, and to award recoupment of any such excess to protesting roads,—the latter acting at their peril if they fail to pay the collectively-fixed prices in the first instance, however unreasonable. The Court thus substitutes for the non-assenters' statutory right to bargain independently a requirement that non-assenters are bound to pay whatever uniform price is fixed by collective industry-group action, provided only that that uniform price does not exceed *the maximum limit* of the zone of reasonableness. If, as these

appellants contend, Agreement No. 7 does not authorize and §5a(9) does not exempt collective action which will bind non-assenters, the District Court has also held that the Commission may lend the aid of its adjudicatory powers to parties acting in furtherance of a combination and conspiracy unlawful under the Sherman Law.

By its decree remanding the cause, the District Court has directed further Commission proceedings to be had in accordance with these holdings.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

The questions presented by these appeals have not previously been decided by this Court, or by any other Court except the Court below. They are basic to the resolution of a controversy which has divided the railroad industry for years. Although unanimous in rejecting the Commission's order, the Court below divided as to the disposition of the case. The dissenting judge was of the opinion that the statutory safeguards of both §5a and §1(14)(a) were destroyed by the holdings of the majority, that "Here, we have an instance of an abandonment of its functions by the Commission altogether in favor of the long-haul trunk line railroads", that approval of the Commission's order would endorse "the clearest of anti-trust violations by illegal price-fixing", that the Commission has no jurisdiction, and that the cause should not be remanded to it for further proceedings.

These appeals raise serious questions of administrative law of general importance as to the interpretation of the Administrative Procedure and Interstate Commerce Acts, and the extent of Sherman Act exemption under §5a.

The decision below gives judicial approval to an order which, though adjudicatory in form, delegates agency rule-making authority to a dominant segment of the industry acting collectively by agreement, and also gives retroactive regulatory effect to the collective uniform price-fixing actions of that industry segment. The applicable rule-making provision, §1(14)(a), specifically includes the subject matter of "compensation" payable by one railroad for the use of another's cars, whereas §§1(10) and 1(11), enacted contemporaneously therewith, make no reference thereto. But the Court below reads "compensation" into the latter provisions in order to find Commission jurisdiction thereunder.

Further, this case presents for the first time for judicial construction the scope of the anti-trust exemption granted by §5a (the "Bulwinkle Act"). The decision below ignores the limitations on exemption specified in §5a(9) as to "the carrying out" of a Commission-approved price-fixing agreement, and it strips all substance from the important right granted to non-assenting railroads by §5a(6) "to take independent action" with respect to collective industry price-fixing determinations. The decision below also holds that agency adjudicatory processes may be utilized in aid of enforcing against non-assenters collective industry price-fixing determinations—insulated from the Sherman Act.

A. Rule-Making and the Administrative Procedure Act:

The decision authorizes the Commission to by-pass the expressly applicable rule-making provision, §1(14)(a), by resorting to declaratory order procedure. While a majority of the Court finds adjudicatory jurisdiction under §1(11) to support a declaratory order as between individual carriers, it also finds the result of such adjudication and declaration to be, in practical effect, uniformly binding upon

the entire industry, not merely upon the litigants (Appendix A, p. 6a, fn. 4); the end result, in other words, is *rule-making*. Indeed, the avowed purpose of the Commission proceeding, initiated by the dominant industry group, was to have the Commission declare and make enforceable a rule of general application which would be binding upon the whole industry. Clearly, if the Commission may promulgate car-hire rules without resort to §1(14)(a), the statutory safeguards surrounding the rule-making procedure are circumvented, and the Congressional intent frustrated.

The decision also authorizes the use of declaratory order procedure in a proceeding which, although in form adjudicatory, is in purpose and in practical effect regulatory. Congress, on the other hand, in the Administrative Procedure Act, clearly evidenced its intent to confine that procedure to cases where it would serve to resolve private controversies as to matters otherwise within the jurisdiction of the administrative agency,—in contradistinction to the promulgation of general rules and regulations. (Administrative Procedure Act, §§2(c)-(d), 4, 5). If the decision below stands, agency rules need no longer be promulgated under expressly applicable rule-making provisions. Undoubtedly it may often be more expedient to the dominant section of the industry, if not to the agency involved, to resort to declaratory order procedure.

Moreover, this controversy concerns the proper car-hire charge for the *past* as well as for the present and the future. By approving a declaratory order in a case such as this, although recognizing that as a practical matter, it will be binding upon the entire industry as well as upon the parties, the decision below authorizes the Commission to promulgate indirectly, by following the form of an adjudicatory proceeding, retroactive rules respecting car-hire which it

could not promulgate directly under §1(14)(a). (§15(2); Administrative Procedure Act §2(c); cf. *Brimstone R.R. Co.* v. *United States,* 276 U. S. 104, 1928; cf. also *United States* v. *Baltimore and Ohio R. Co.,* 284 U. S. 195, 1931.)

Finally, to authorize the Commission to compel not only the non-assenting railroads parties to the litigation before it, but every railroad in the country, to observe for the future as well as retroactively, a uniform car-hire charge fixed by the car-owning roads is, in essence, to approve a delegation of agency rule-making authority to private persons. (Cf. *A. L. A. Schechter Poultry Corp.* v. *United States,* 295 U. S. 495, 537, 1935; *Carter* v. *Carter Coal Co.,* 298 U. S. 238, 311, 1936.)

B. § 1(11) of the Interstate Commerce Act:

While recognizing that in practical effect the Commission's order established a uniform rule binding on all railroads, the majority opinion treats with it as one declaring the separate rights and duties of individual carriers parties to the proceeding before it, and therefore adjudicatory in nature. Meeting the District Court on its own ground, it is clear, as the District Court itself recognized, that the Commission had jurisdiction to make a declaratory order only if it had jurisdiction to adjudicate (Administrative Procedure Act §9(a)), and had jurisdiction to adjudicate only if the Act imposed statutory duties upon *both* car-owners and car-users with respect to the receipt and payment of the car-hire charges in issue under the complaint before it.

A duty merely upon the car-owners not to receive car-hire in an amount exceeding the limit of reasonableness would not support jurisdiction. The controversy and uncer-

tainty underlying the proceeding before the Commission concern not the right of the car-owners to receive, but *the duty of the car-users to pay,* the car-hire charges demanded by the owners. Hence, any order which left the car-users free to pay or not as they might choose would neither terminate the controversy nor remove the uncertainty.

Recognizing this, the District Court postulated as the basis for its conclusion that the Commission had jurisdiction, its determination that §1(11) of the Act not only imposes upon every car-owner the statutory duty not to receive amounts in payment for car-hire in excess of the maximum limit of reasonable compensation (Appendix A pp. 7a-10a), but imposes upon every car-user the correlative duty to pay the amount demanded by the owner, at least if within that limit (*ibid.* and *id.* p. 6a, fn. 4).

Specific statutory reference is made to compensation as between carriers in §1(14)(a) and in §1(4) (the earlier through routes provision); by contrast no such reference appears in §§1(11) and 1(10), which were adopted at the same time and as part of the same legislation[12] as §1(14). From the standpoint of statutory construction, therefore, the question is: whether the inclusion of such reference in some sections and its exclusion from others should be disregarded, in order to support an interpretation of §1(11) as embracing the subject-matter of compensation for the use of cars. (Cf. *Chicago, Rock Island & Pacific Railway Co.* v. *United States,* 284 U. S. 80, 99, 1931; see also *Missouri Pacific R. Co.* v. *Norwood,* 283 U. S. 249, 257, 1931.)

Even if these differences in statutory specification of subject matter are to be given no differentiating signifi-

[12] The Esch Car Service Act of May 29, 1917, c. 23, 40 Stat. 101.

cance, the broader question nevertheless arises: whether the imposition by §1(11) on carriers of general duties respecting "car service" should be interpreted to impose upon a car-user who is required by law to use the car of another railroad, the duty to pay therefor whatever charge the owner may see fit to demand, provided only the amount so demanded does not exceed the maximum limits of reasonableness.[13] Congress has not, in any other field[14] which has come to our attention, given to one private party such power over the economic destiny of another.

If it be suggested that the Commission can and will protect the car-user against the car-owner's natural tendency to maximize the amount of car-hire, the short answer is that under the decision of the District Court the Commission's adjudicatory jurisdiction is limited to determining whether the charge demanded by the car-owner exceeds the maximum limits of reasonableness.

C. Section 5a and the Exercise of Rule-Making Power by the Car-Owning Roads:

Assuming (contrary to these appellants' belief) that §1(11) of the Act imposes upon carriers any duties with respect to the payment of compensation for car use, those

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[13] Obligations under §1(4) in respect of through routes, except where established by the Commission, rest in the last analysis upon agreement among the participating carriers; and obligations in respect of the operation of such routes, therefore, likewise are based upon agreement among the carriers and not upon the unilateral determination of one of the carriers involved.

[14] The situation as to freight rates does not afford a parallel since no shipper is required by law to avail himself of the facilities of a particular carrier, and competition with other types of carriers, if not with other railroads, is always open to keep the rates down to a fair competitive level.

duties are imposed upon them severally and not collectively. Moreover, the requirement is that the rules and practices respecting car service shall be reasonable—not that they be uniform. Indeed, a uniform rule which was entirely reasonable as applied under some circumstances might be wholly unreasonable under other circumstances. And whatever practical advantages might appear to flow from a uniform rule for the calculation of car-hire applicable to all railroads, the question remains: whether any such uniform rule which has not been established by the Commission in the exercise of its undoubted rule-making power, but by private agreement of the owners of a majority of the freight cars, can be imposed upon these appellants and other carriers without their assent, and be enforced by the Commission in the exercise of its adjudicatory powers under §1(11).

The right to confer and to agree upon such matters is given to railroads by §5a of the Act by way of derogation from the general prohibitions of the Sherman Law. But any agreement reached under that Section is required to, and in this case did, reserve to all parties to the agreement the "free and unrestrained right to take independent action" with respect to any determinations arrived at under the agreement's procedure.

Even without such a provision, this Court concluded, in *Schwegmann Bros.* v. *Calvert Corporation*, 341 U. S. 384 (1951), that the analogous exemption under the Miller-Tydings Act did not, in the absence of express statutory provision therefor, extend to an attempt to impose prices fixed under a price-fixing arrangement on others not voluntarily assenting thereto. In the Miller-Tydings Act and the later Maguire Act, it may be noted, Congress has expressly limited the exemption to situations where product com-

petition serves as a check upon the natural tendency of every seller to maximize his return. In the case of agreements as to freight rates, similarly, Section 5a automatically provides the same safeguards, since railroads compete for the patronage of shippers not only among themselves but with other forms of transportation.

But not so as to car-hire: in their use of freight cars, the appellants and other terminal railroads provide the car-owners with a truly captive market. There is no competition among car-owners in the tendering of cars; whatever cars are tendered to the car-users they must take. Car-users are not even free to use their own cars for shipments off-line unless there are no foreign-owned cars on their lines available for loading. In the last analysis, the car-owning railroads, in fixing their charge, are not even subject to the normal laws of supply and demand: the "amount which the traffic will bear" is the highest amount which the terminal roads are able to pay and still remain in business.

Thus, if a using road is not free to refuse to pay the charges demanded of it and thereby equalize its negotiating position or force Commission regulation under §1(14)(a), economically speaking it is completely at the mercy of the car-owners. Participation in the procedures by which the charges are arrived at affords no protection; under the agreement which the Commission has approved, the power to fix the charge is vested in the roads owning a majority of the freight cars, that is, in the creditor roads. Over the past twelve years, as the Record shows, they have exercised that power in their own interest, to fix higher and higher charges, each successive increase being based in large measure not on changes in the underlying costs of car own-

ership but on changes in the formulae by which such "costs" are determined. Unless unanimous assent is required, it would, indeed, be quite unrealistic to expect the railroads participating in the price-fixing process permanently to be guided by anything other than their own self-interest.

The power which the District Court holds the Commission to possess, to award refund of charges paid which are in excess of the maximum limits of reasonable compensation, would give the debtor roads only a limited measure of protection, by no means equivalent either to the protection which competition gives to shippers with regard to freight rates, or to that which the alternative of responsible Commission regulation under §1(14)(a) would give to car-users. And it is such responsible Commission regulation which, in our view, Congress intended as the sole alternative to voluntary agreement among the railroads involved.

As the Commission almost explicity avows,[15] in passing upon the car-hire charges fixed by the car-owners the Commission acted not as a regulatory but as a reviewing body, whose function (under the District Court's decision) is not to prescribe the proper car-hire charge but to determine whether the charge prescribed by the car-owners exceeds permissible limits.

If we assume, for the sake of the present discussion only, that every one of the formulae that the car-owners devised to support their increased car-hire charges could

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[15] In its statement that because the charges which the car-owning roads had collectively fixed under the agreement could properly be established by the Commission itself under Section 1(14)(a), "It necessarily follows that lower charges in our judgment would not be compensatory, either at present or in the past." (Appendix A, p. 59a)

have been employed by the Commission as the basis for prescription of car-hire charges under §1(14)(a), then it should also, we suggest, be assumed that the Commission would not, over the years, successively have changed its formulae in each instance in such a way as to increase the car-hire charges over what they would have been under the formula previously employed. It may also be doubted whether the Commission would have adopted, in prescribing car-hire charges, bases and standards of valuation[16] which it does not employ in exercising its regulatory functions affecting the income of carriers from transportation services.

When all procedural niceties have been cut through, it becomes apparent that what is here involved is the formulation and enforcement of a general rule, which is the essence of regulation, and that the primary regulatory function has been performed not by the Commission but by the car-owners themselves. The present question, accordingly, comes to this: Has Congress conferred upon the car-owners the power, unchecked by competition, jointly to formulate rules with respect to the amount of car-hire payable, to be uniformly observed by car-users, and has it authorized the Commission to enforce rules so formulated if within the outside limits of reasonableness? We know of no case in which Congress has given such power to any other private industry group in like circumstances. (Cf. *A. L. A. Schechter Poultry Corp.* v. *United States; Carter* v. *Carter Coal Co., supra.*)

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[16] *e.g.*, the use of estimated reproduction value as the base for calculating depreciation and return on investment.

D. The Sherman Act:

If we are sustained in our view that agreement among some railroads upon the rate of car-hire to be paid by other, and objecting, railroads is authorized neither by §5a of the Act nor by the Commission-approved agreement thereunder[17], it necessarily follows that the attempts which (as the Record shows) numerous railroads have made to enforce their agreed rates upon these appellants and other non-assenting railroads were not statutorily exempted by §5a(9) of the Interstate Commerce Act, and therefore were in violation of §§1 and 2 of the Sherman Act. The complaint before the Commission explicitly avows as its object such enforcement of those agreed rates—not, be it noted, the adoption of those rates as rates formulated and prescribed by the Commission in the exercise of its regulatory function. The question is thus squarely presented whether the established rule that no court will lend its aid to the implementation of an unlawful conspiracy (*Continental Wall-Paper Co.* v. *Voight & Sons Company,* 212 U. S. 227, 1909; *B. B. Chemical Co.* v. *Ellis,* 314 U. S. 495, 1942; *Mercoid Corp.* v. *Midcontinent Co.,* 320 U. S. 661, 1944; *Mercoid Corp.* v. *Minneapolis Honeywell Regulator Co.,* 320 U. S. 680, 1944; *Katzinger Co.* v. *Chicago Mfg. Co.,* 329 U. S. 394, 1947; *Rutkin* v. *Reinfeld,* 229 F. 2d 248, C. C. A. 2d 1956) applies also to an administrative tribunal.

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[17] See *Ahnapee & Western Railway Company, et al.* v. *Akron & Barberton Belt Railroad Co. et al.,* I. C. C. Docket No. 31774, November 12, 1957, 302 ICC 265.

CONCLUSION

The Court has jurisdiction of these appeals, and the questions presented thereby are so substantial as to require plenary consideration with briefs on the merits and oral argument for their resolution.

Respectfully submitted,

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APPENDIX A

Opinions Below

I. Majority Opinion of the District Court

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MASSACHUSETTS

Civil Action

No. 56-1004-M

BOSTON & MAINE RAILROAD, ET AL

vs.

UNITED STATES OF AMERICA AND
INTERSTATE COMMERCE COMMISSION

BEFORE WOODBURY, Circuit Judge, AND WYZANSKI AND McCARTHY, District Judges, by designation of Chief Judge MAGRUDER pursuant to Title 28 U.S.C. §2284.

OPINION OF THE COURT

April 28, 1958

WOODBURY, Circuit Judge. This is a controversy, in the main between the long-haul trunk line railroads and the short-haul terminal railroads, over the price a railroad ought to pay for the use on its lines of freight cars owned by another railroad.

The question of car hire is not novel. To understand its present aspects a little history will prove helpful.

In the early days of railroading in this country no railroad allowed its freight cars to leave its rails. Through freight to be transported over more than one line was unloaded and reloaded at junction points. With the development of more efficient transportation methods following the Civil War this wasteful and time-consuming practice of transferring cargo was gradually abandoned and for a charge the railroads began to permit their loaded cars to move off their tracks on to the tracks of connecting carriers.[1] At first the compensation to the car-owning road was fixed by the railroads on the basis of the mileage travelled by the cars of one road over the tracks of another. This basis for compensation, however, proved unsatisfactory largely for two reasons; the car-owning road had no means of verifying the mileage travelled by each of its cars over other lines and it provided no incentive to the using road for the prompt handling and early return of cars to their owners.[2]

As a solution the American Railway Association about the turn of the century, after years of study and investigation, established as the basis for compensation a flat sum per day for car use, regardless of the type or age of the car involved or the distance it travelled over the user's line. The *per diem* rate for use, known simply as the *per diem*, was gradually increased by the railroads over the years until it reached a point in the early 1950's at which the short- haul, terminating, and predominantly car-using railroads rebelled. This brings us to the present controversy and its background.

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[1] In 1911 car interchange was made obligatory.

[2] For a more detailed history see *Chicago, R. I. & P. Ry. Co.* v. *United States*, 284 U. S. 80, 90 *et seq.* (1931), and Stone, J., dissenting, at page 101 *et seq.*

Except for one abortive attempt by the Interstate Commerce Commission, see *Palmer* v. *United States*, 75 F. Supp. 63 (1947), the *per diem* rate has always been set by the railroads themselves acting in recent years through their organization, the Association of American Railroads, known as the AAR. An agreement, known as Agreement No. 7, was drafted by the AAR setting up the procedures to be followed by it in fixing *per diem* rates and this agreement was signed by a majority of the railroads.[3] Acting according to the procedures outlined in the agreement, *per diem* rates were fixed at $1.50 as of September 1, 1947; $1.75 as of November 1, 1949; $2.00 as of May 1, 1952; and $2.40 as of August 1, 1953.

At first the railroads generally, signers and non-signers of the agreement alike, settled with one another at the rates established thereunder. In March, 1951, however, the New York, Susquehanna & Western Railroad (Susquehanna hereinafter), which was not a party to the agreement, served notice that after April 1 it would no longer pay the $1.75 rate then in effect, but offered to settle its *per diem* debit balances thereafter on a graduated scale ranging from $1.20 to $2.00 depending on the age of the cars it used. It later offered to increase its scale to a range of from $1.33 to $2.21 but its offers were not accepted and in consequence it became embroiled in a number of law suits. In June, 1953, the Boston & Maine Railroad and the New York, New Haven and Hartford Railroad Company withdrew from the agreement and gave notice of their refusal to pay the $2.40 rate and also even the earlier $2.00 rate

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[3] The Agreement provided for rights of withdrawal and independent action by the signatory railroads, and the Commission, acting under §5a(2) of the Act, approved it as in compliance with §5a(6) and therefore valid in spite of the Anti Trust Laws. *Association of American Railroads—Agreement*, 277 ICC 413. Reopened and reconsidered *Ahnapee & W. R. Co.* v. *Akron & B. R. R. Co.*, ICC Docket No. 31774, decided March 7, 1957.

after July 31, 1954 [*sic.*—actually 1953] the Boston & Maine offering to pay on either a graduated basis or at a flat rate of $1.72 per day. Several other railroads took similar courses and the present proceeding ensued.

It started with a complaint filed with the Interstate Commerce Commission by 19 of the larger class I railroads, against five other class I railroads, all of them short-haul roads like the Boston & Maine, the New Haven, and the Susquehanna, and six short-line roads in classes II and III, such as the Barre and Chelsea, the St. Johnsbury & Lamoille County and the New Jersey and New York Railway Company (Horace Banta, Trustee). Fifteen class I railroads intervened on behalf of the complainants and fifty-six railroads, for the most part in classes II and III, intervened on behalf of the respondents.

The complainants disclaimed any intention to invoke the specific power conferred on the Commission by §1(14)(a) of the Act which authorizes it "to establish reasonable rules, regulations and practices with respect * * * to the compensation to be paid * * * for the use of any * * * car * * * not owned by the carrier using it * * *." Instead, alleging that charges less than those fixed under Agreement No. 7 would be unjust, unreasonable and non-compensatory, and that the respondents' actions in offering to pay at other than the uniform *per diem* rate established therein, had been, were and would be disruptive of the "uniform national basis" for handling *per diem* which the Commission had deemed necessary in the public interest, the complainants asked that:

> "the Commission find and declare that the per diem rates of $1.75 and $2, during the periods in which

these rates were effective, were just, reasonable, and otherwise lawful, that the current per diem rate of $2.40, effective August 1, 1953, is just, reasonable and otherwise lawful, and that the performance of orderly transportation service by railroad in the public interest requires uniform observance of such rates by defendants together with other carriers; and that the Commission grant such other and further relief as may be required in the premises."

The defendants answered, in general challenging the *per diem* rates established under the agreement as excessive and asserting that their offers of settlement were fair, just reasonable and compensatory. In addition some of them challenged the jurisdiction of the Commission to entertain the complaint. The matter came on for hearing before a trial examiner and he, upon full presentation, filed a proposed report wherein after considering the evidence and arguments in detail he concluded that "The Commission should find and declare that the *per diem* charges of $1.75 and $2.00 were reasonable during the periods in which they were effective and that a reasonable charge for present use would be $2.10." He accordingly recommended the entry of a declaratory order to that effect.

On exceptions the full Commission reached conclusions differing in part from those reached by the trial examiner. It found on its analysis of the evidence and the arguments that the *per diem* rates as fixed in the agreement were fair and reasonable. It said that "on the basis of the facts and circumstances before us" the *per diem* charges specified in the agreement were such as "could properly

be established under section 1(14)(a)" of the Act and that: "It necessarily follows that lower charges in our judgment would not be compensatory, either at present or in the past." Wherefore, it said: "We find and declare that the *per diem* charges of $1.75, $2.00 and $2.40 were not in excess of reasonable compensation during the periods in which they were effective, and that the latter charge is not in excess of reasonable compensation for present use," and it entered an order discontinuing the proceeding.[4] *Chicago, Burlington & Quincy Railroad Co.* v. *New York, Susquehanna & Western Railroad Co.*, 297 ICC 291 (1955), reconsideration and rehearing etc. denied, July 16, 1956.

At the outset of our consideration of this action brought by a number of terminal short-haul railroads under Title 28 U.S.C. §1336 to enjoin, set aside and annul the above order of the Interstate Commerce Commission, we are faced with the question of its jurisdiction. The assertion is, broadly stated, that the only jurisdiction conferred by Congress on the Commission in the premises is that embodied in §1(14)(a) giving it power to "establish reasonable rules, regulations, and practices with respect to car service * * * including the compensation to be paid" by one railroad for the use of the cars of another, and that, since this jurisdiction was neither invoked nor exercised, it must follow that the Commission does not have authority

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[4] We have little doubt that the Commission's order is subject to judicial review under the rule of *Frozen Food Express* v. *United States*, 351 U. S. 40 (1956), for the practical impact of the order is to require the respondent carriers, and, indeed, as a practical matter all others, to pay the charges for car-use found to be reasonably compensatory at the risk of the imposition of sanctions for violating §1(11) of the Act to be considered presently.

to enter a declaratory order as to past or even present rates. We do not agree.

Section 5(d) of the Administrative Procedure Act, 60 Stat. 239, 5 U.S.C. §1004(d) provides that within its jurisdiction any agency "is authorized in its sound discretion, with like effect as in the case of other orders, to issue a declaratory order to terminate a controversy or remove uncertainty." There can be no doubt that the railroads involved are subject to the jurisdiction of the Commission, nor can there be any doubt that a "controversy" exists between them with respect to car-hire. The question is whether the subject matter of their controversy is within the jurisdiction of the Commission. We think that it is.

Certainly the Commission could if it chose, after notice, embark under §1(14)(a) of the Act upon a full scale investigation and as a result establish by reasonable rules or regulations future practices with respect to car service, including the compensation to be paid by one railroad for the use of freight cars owned by another railroad. But it was not asked to do this and it has disclaimed any intention to do so.

Section 1(14)(a), however, is not the only section of the Act conferring regulatory powers on the Commission with respect to the use by one railroad of another's cars. Section 1(10) defines "car service" to include the "use, control, supply, movement, distribution, exchange, interchange, and return of locomotives, cars and other vehicles used in the transportation of property * * * by any carrier by railroad subject to this chapter," and subsection (11) provides:

> "It shall be the duty of every carrier by railroad subject to this chapter to furnish safe and adequate car service and to establish, observe, and enforce just and reasonable rules, regulations, and practices with respect to car service; and every unjust and unreasonable rule, regulation and practice with respect to car service is prohibited and declared to be unlawful."

In addition to the criminal sanctions imposed by §10 of the Act, §8 provides that in the event that any common carrier by railroad subject to the Act shall do, or cause or permit to be done, any act, matter or thing "prohibited or declared to be unlawful" it "shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation," together with a reasonable counsel fee. And §9, gives persons claiming damages under §8 the election of proceeding in a court of competent jurisdiction or else making a "complaint to the Commission as hereinafter provided." Section 13(1) of the Act provides for the filing with the Commission of complaints against carriers for violations of the Act and §16(1) provides:

> "If, after hearing on a complaint made as provided in §13 of this title, the commission shall determine that any party complainant is entitled to an award of damages under the provisions of this chapter for a violation thereof, the commission shall make an order directing the carrier to pay to the complainant the sum to which he is entitled on or before a day named."

It is true that compensation for the use of cars is not specifically included in the definition of "car service" in subsection 10, whereas §1(14)(a) in giving the Commission power to "establish reasonable rules, regulations and practices with respect to car service" goes on to state "including the compensation to be paid * * * for the use of any * * * car or other vehicle not owned by the carrier using it * * *." It is asserted that the provisions being in some respects in *pari materia* the specific inclusion of compensation for use in §1(14)(a) indicates clearly that the omission of any mention of compensation in defining car service in subsection 10 could not have been inadvertent with the result that Congress must have intended in subsection 11 to impose no duty on the railroads to establish, observe and enforce just and reasonable *per diem* charges. We do not find the argument persuasive.

Car service is broadly defined in subsection 10 to include the "use" and "interchange" of cars, and historically and also very naturally, compensation has always been incidental to and an integral part of the "interchange" of cars between railroads and the "use" of the cars of one railroad by another. Moreover, to construe compensation as outside the ambit of the meaning of "use" or "interchange" as used in subsection (10) would leave the railroads free to make whatever "unjust" or "unreasonable" rules, regulations or practices they might choose with respect to compensation for car use without running afoul of subsection (11). It is hard for us to assume that Congress could have intended any such thing. On the contrary, we think it far more

likely that Congress intended to give a right of action for damages to any one suffering loss from an excessive rate of hire for the use of cars.

Our conclusion therefore is that §1(11) reasonably construed imposes a duty upon the railroads to charge no more than reasonable compensation for the use of their cars by other railroads, that §13(1) empowers the Commission to entertain complaints alleging excessive charges for car hire, and that §16 gives the Commission authority to enter orders awarding damages to those harmed by excessive car hire charges. Thus, since the Commission has jurisdiction to enter an order awarding damages for past or present unreasonable charges for car hire, it has jurisdiction under §5(d) of the Administrative Procedure Act in its discretion to enter a declaratory order with respect to the reasonableness of such charges.

We turn now to the merits.

The trunk line long-haul railroads, serving as they do the relatively sparsely settled and predominantly producing areas of the country, originate more traffic than they terminate. The short-haul railroads serving the coastal ports and the relatively more heavily populated and predominantly manufacturing areas, on the contrary, terminate more traffic than they originate. Thus, since a railroad must provide cars enough to handle the freight originating on its lines, the freight car equipment of the country is for the most part owned by the trunk line railroads and that owned by the short-haul lines is almost a negligible proportion of the whole. See *Chicago R. I. & P. R. Co.* v. *United States*, 284 U. S. 80, 93, 95 (1931). This

situation does not exist because of default by the short lines. Having more cars coming in from other lines to unload than they have cars to load and send back, they naturally, to avoid back hauling empty cars, prefer to load and return foreign cars instead of loading their own cars for dispatch off their lines. And this practice has the sanction of Car Service Rule 1, see *Car Service, Freight Cars*, 268 ICC 687, which provides:

> "Home cars shall not be used for [the] movement of traffic beyond the limits of the home road when the use of other suitable cars under these rules is practicable."

From the fact that railroads first load off-line freight on available foreign line cars, it is obvious that if a short-line predominantly freight-terminating road owns many cars it will have a surplus which must perforce remain wastefully idle on its sidings awaiting an overflow of traffic, if any. Thus the trunk lines, as owners, for the most part furnish the freight car equipment used by the short lines and the short line traffic-terminating roads are perforce *per diem* debit roads, interested in a low *per diem* rate, whereas the long-haul predominantly traffic-originating roads are *per diem* credit roads interested in a high *per diem* rate. The present controversy stems from this conflict of interest.

The short line roads contend that under Agreement 7 mentioned above the trunk lines through their voting power (under the agreement *per diem* rate increases are authorized by vote of the signatory railroads, each road casting one vote for each freight car that it owns) have raised

the *per diem* rate to a more than compensatory level, and they charge the Commission with error in putting its stamp of approval on the rate increases established under the agreement.

There is not and cannot be any question that every railroad is entitled to be paid fair and just compensation for the use of its freight cars by another road. Nor can there be any question that from the car owner's point of view *per diem* is by and large and on the whole a fair enough method for calculating the compensation to which it is entitled. The question is whether *per diem,* which takes account only of the time factor and leaves out altogether the use factor, that is distance travelled on the user's line, is a fair method of determining compensation from the car user's point of view. And, if this question be answered in the affirmative and *per diem* be approved as the fairest practical method for calculating compensation from both points of view, the question then arises whether the Commission erred in its calculation of the fair *per diem* rate. We shall consider the question last stated first.

It has long been generally recognized that car hire, however established, should be enough reasonably to compensate the car owner for its costs of ownership and no more, and with this in mind that the *per diem* charge should be enough, but no more than enough, to cover the cost to the car owner of 1) repairs, 2) taxes, 3) depreciation, 4) interest on investment, and 5) miscellaneous expenses of ownership. Obviously therefore the determination of the *per diem* rate poses a complicated question of railroad cost accounting committed by law

to the Commission as a matter peculiarly within its expert competence. We therefore approach our analysis of the Commission's computations with due deference.

Detailed analysis of the Commission's computations with respect to each one of the items of car ownership expense listed above is not necessary for present purposes. We shall consider but two of them, repairs and depreciation, and the so-called "car day divisor" by which annual costs of freight car ownership are divided to reach the cost per day.

The item for repairs, the largest single component of the *per diem* charge, was calculated by the Commission largely on the basis of an account required by the Commission to be kept by all railroads known as Account 314, Freight Train Cars—Repairs. This account is of a comprehensive nature including the cost of repairs to cabooses and refrigerator cars not covered by *per diem,* and a number of other costs and expenses not directly related to the use of foreign cars. The Commission made allowances for some of these irrelevant costs included in the account but it rejected the suggestion that the account be broken down by the railroads to reflect more accurately the actual annual cost of maintaining a freight car. Such a break down of the account was recommended by the Subcommittee on Mileage and Per Diem of the AAR, which was charged with the specific duty of fixing *per diem* under Agreement No. 7, but the General Committee of the AAR having final say on *per diem* rejected the recommendation.

There was persuasive evidence that a break down of the account was practical, indeed, that some railroads at little

accounting cost were already doing so for their own information. Nevertheless the Commission said:

> "The recommendation of the Subcommittee deserves further consideration. However, it is not desirable to delay the decision of this case pending an effort to provide additional data bearing on car repairs."

Perhaps it is within the Commission's competence to reject the recommendation in the interest of expedition. But we do think it should not have done so without a more thorough investigation and more detailed findings and analysis. If the recommendation deserved consideration it should have been considered, for there was ample evidence introduced to show the value of a break down of the account in reaching an accurate computation of *per diem* and also to show that such a break down was not impractical.

Depreciation, the second largest element of the *per diem* charge, was calculated by the trial examiner on the basis of the undepreciated ledger value, that is the cost, of the freight car equipment in use which he said was "in accordance with the generally accepted accounting theory." The Commission, however, disagreed. It held that the basis should be "undepreciated reproduction value." We think that this holding is open to very serious question.

The Commission said that it realized that the prevailing accounting practice in determining depreciation was to use ledger value. But it said that it was "not here concerned with the propriety of that practice," because it was engaged in determining the just and reasonable *per diem* rates in effect at the present and during the relevant

periods in the past, and in reaching that determination it would be less than realistic if it failed to take into consideration "that carriers who now buy cars must pay prices predicated on present values, and those who rent cars owned by others should expect to pay rentals based on such values."

If depreciation is an element, and not a minor one, of the *per diem* charge, we fail to see why accepted accounting practices for determining depreciation should be tossed aside as irrelevant. Moreover, as the trial examiner pointed out, ledger value is a known figure whereas the cost of reproduction can at best only be estimated and the process is inherently difficult because it involves many assumptions which are at least open to question. Furthermore, there is persuasive evidence that with ever faster freight trains and ever more efficient use of cars, present freight car requirements are met with fewer cars than were formerly needed with the result that in all probability many cars now in use will never actually be replaced so that on the Commission's basis car users in paying *per diem* will in part be compensating car owners for expenses they will never incur.

We turn now to the "car day divisor" by which the Commission determined the average cost per day of car ownership.

It appears to be generally agreed that surplus or unservicable cars should not be included in computing the average daily cost of owning a freight car. The question therefore is to determine the average number of days per year that freight cars are in active use, that is to say, either in active use on the line of the owner, or else on a

foreign line, whether in active use thereon, or laid up for repairs, or standing idle. Since no car is in active use all the time an adjustment is necessary to spread the actual annual cost of ownership over the shorter period when the car is in active use. This is accomplished by means of a car-utilization ratio which is, simply, the ratio which the average number of days a freight car is in active use bears to 365, the number of days in the year.

Since all the freight cars in the fleet are not in active use all the time, the utilization ratio is always less than 100 per cent. The effect of the ratio, therefore, is to increase the *per diem* charge over what it would be if all cars were in use all the time and consequently the lower the ratio the higher the *per diem* charge. That is, a ratio of say 75% would lead to a higher *per diem* charge than a ratio of say 90%.

The Commission, to determine the appropriate car utilization ratio for calculating *per diem,* averaged actual car utilization over the past twenty years. This period included several of the depression years of the 1930's when many freight cars lay idle for want of traffic and consequently use of the twenty-year period produced a lower ratio, and a higher *per diem,* then would have been the case had a shorter period been used.

The plaintiffs argue strenuously and persuasively for the use of a shorter period than twenty years in computing average-freight car utilization. We would find it difficult, however, in view of the nature of the question and the Commission's expertness in the field, to say that the Commission committed error of law in using the twenty-year

period. But the Commission reached its conclusion in part upon an earlier decision, *Alabama, T. & N. R. Co.* v. *Aberdeen & R. R. Co.*, 274 I.C.C. 383 (1949), from which it quoted, wherein it had said at page 389: "The evidence is persuasive that an active-car divisor reflecting average age, now approximating 20 years, of freight cars in service, and covering representative periods of both heavy and light traffic, would produce more accurate results than a period of 5, 10 or 15 years." We think the Commission erred insofar as it considered car-age a factor in computing car-utilization. We agree with the statement of the trial examiner who said in this connection:

> "The mere fact that freight cars have an average life of about 20 years affords little or no ground for assuming that their probable utilization in any given future year will be the same as that for the average of the past 20 years. There is no reason to believe that economic cycles are so marked."

The foregoing discussion is more by way of warning to the Commission for its future guidance than a statement of the grounds for our decision annulling and setting aside the order of the Commission. Basically and fundamentally we ground the result which we reach upon the inadequacy of the Commission's consideration of the first question stated earlier in this opinion.

Per diem, as Mr. Justice Stone pointed out in his dissent in *Chicago R. I. & P. Ry. Co.* v. *United States*, 284 U. S. 80, 112 (1931), "is admittedly but a rule of thumb." We are not fully persuaded, however, as Mr. Justice Stone suggested, that it is nonetheless "the best which experience

has devised to meet all the complex requirements growing out of the average car-hire situation." The *per diem* method may work out well enough on the average over a period of years to provide the railroads as car owners with fair compensation for the use of their cars. But there is another side to the coin, and that is the fairness of the method to the railroads as car users.

The short-haul, terminating and predominantly freight car-using railroads, by the very nature of their operation, move freight cars relatively short distances over their lines. And, as the Commission pointed out, "The average detention per car in their terminals is high." Thus on these roads, because of their short-haul terminating nature, the average freight car is subjected to relatively little mileage, and, on the other hand, is necessarily detained for unloading, and if traffic permits reloading, for a relatively long period of time in relation to its total mileage movement. On the basis of these considerations, supplemented by evidence that a study conducted in 1948 by the Engineering Section of the Commission's Bureau of Valuation disclosed that 70% of the cost of freight car repairs and 45% of the cost of freight car depreciation are directly attributable to the mileage to which a car is subjected as distinguished from the passage of time alone, the plaintiffs strenuously argue for a method of calculating car-hire which will include a mileage factor in addition to a time factor. They do not suggest going back to the early method of calculating car hire solely on the basis of the mileage travelled by each foreign car on a user's line. Nor do they suggest any sort of pure mileage basis for calculating car-hire, such, for in-

stance, as a rate calculated only on the average mileage travelled by freight cars on a user's line.

Their suggestion is that a fixed mileage factor be determined for each road based upon the average distance in miles which freight cars move per day on its lines, which it is said can easily be determined from statistics kept by the railroads and will need to be revised only when there is a substantial change in a railroad's freight traffic pattern, and that this use factor be used in conjunction with a uniform time factor for all railroads to produce a rate of car-hire fair to all railroads, both short and long-haul.

Basically this time-mileage plan involves a separation of the national aggregate car ownership cost into two categories, one consisting of that proportion of the aggregate cost directly attributable to mileage use and the other consisting of the remainder which is treated as attributable to the passage of time. Thus under the plan the *per diem* car-hire charge for a particular road is a composite figure consisting of the sum of that particular road's mileage component and the uniform national average unit cost per day attributable to time alone. It is said that the function, and the virtue, of this plan is to reallocate the aggregate ownership costs among the using railroads directly in proportion to the actual use, *i.e.* the wear and tear, incurred by cars used on each road.

The Commission gave the plan only cursory consideration. After stating its general features it said that the determination of a separate mileage use rate could not be made from the evidence before it in the case, and more-

over that "it [such determination] would involve a long and complicated statistical undertaking."[5] It then added: "If by that means a scheme of equitable separate charges for individual user roads could be devised, there would be an increase in the labor now required for settling *per diem* accounts." Following this it briefly discussed a plan proposed by the Boston & Maine Railroad for determining a *per diem* rate based on the average age of the freight car fleet of the car-owning road, a plan no longer advocated which we need not consider, and then it said, referring to both plans:

> "As above indicated, the suggested plans for varying *per diem* charges could not be put into effect without an extensive investigation either by this Commission or by the AAR. The facts and arguments here presented are not persuasive that plans of this kind are desirable."

We do not say, for it is not our function to say, that the time-mileage plan proposed is fair and practical and ought to be adopted. What we do say is that the plan deserves more than the cursory consideration given to it by the Commission, for without more detailed findings by it we cannot exercise our judicial function.

It is true that straight *per diem* has been the basis of settlement for freight car use for over fifty years. But that does not render the straight per diem method sacrosanct. The suggested time-mileage plan on its face seems to have much to recommend it for it combines use with

[5] There is little or no specific support for this general statement in the record considered as a whole.

the passage of time as the basis for figuring a rate for car hire, and this certainly seems fairer to the short-haul terminating lines. If the evidence in this case is not sufficient to permit determination of an actual mileage use rate, the Commission can take further evidence or turn the matter over to its accounting staff for investigation and analysis. In advance of a more thorough study we do not see the basis for the Commission's broad conclusion that the plan is both impractical and undesirable. To perform our function in the face of the persuasive evidence that the plan is both desirable and feasible we must have at least some inkling of the basis for the Commission's general conclusions to the contrary. In short we think the Commission erred in brushing aside a matter of such importance to so many vital links in our transportation system with little more than a casual wave of the hand.

We are not impressed with the argument advanced by some of the plaintiffs that the Commission should have dismissed the complaint for a declaratory judgment filed with it by the trunk line roads on the ground that in bringing it the complainants were acting in furtherance of a conspiracy unlawful under the Sherman Anti Trust Act. Indeed, we are so little impressed with the argument that we see no need either to specifically refute it or even to state it in detail.

A decree will be prepared setting aside and annulling the order of the Interstate Commerce Commission.

II. Dissenting Opinion in the District Court

UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

CIVIL ACTION

No. 56-1004-M

BOSTON & MAINE RAILROAD, ET AL

v.

UNITED STATES OF AMERICA AND
INTERSTATE COMMERCE COMMISSION

McCARTHY, D. J. (Dissenting)

This action stems from a basic dispute between the short-line, freight terminating railroads and the car-owning freight originating railroads as to the per diem charges for each freight car while it is on the tracks of any railroad but the owner. The problem before the three judge court concerns the question of the power of the Interstate Commerce Commission to enter the order in ICC Docket No. 31358, and which is presented for review by this court together with the further question of whether or not the order entered was supported by evidence adduced before the Commission.

It is my conclusion that the Commission was without jurisdiction to enter the order in question; hence, this separate opinion in addition to the learned discussion written by Judge Woodbury.

As has been stated by Judge Woodbury the Interstate Commerce Commission entered an order which in itself

clearly indicated that it was not acting under Section 1 (14) (a) of the Interstate Commerce Act. He proceeds, however, and determines that the Commission derives authority elsewhere to enter a declaratory order as to rates. With this determination I cannot agree.

Section 5 (d) of the Administrative Procedure Act authorizes declaratory orders of the sort entered here by the Commission, but this section does not confer jurisdiction. Jurisdiction to enter this order must arise elsewhere. Section 9, Administrative Procedure Act; *Olesen* v. *Stanard,* 227 F. 2d 785. Out of deference to the rights of the parties it is the duty of the court to search the Interstate Commerce Act to determine if jurisdiction to enter an order establishing compensation for so-called per diem charges is granted under the Act separate and apart from Section 1 (14) (a).

Section 1 (4) of the Interstate Commerce Act grants compensation setting power, but this section is limited to through route cases and it is apparent from an examination of the record that the case currently before the three judge court involves more than "through route" usage and compensation.

Section 1(11) grants rule making power, but it does not refer to compensation as such. This section is analogous to Section 1 (12) which has been interpreted by the Supreme Court in *Chicago, Rock Island and Pacific Railway Co.* v. *United States,* 284 U. S. 80, as not including compensation. The language used in that case at page 99 is conclusive of the entire situation: "That subject [compensation for use of cars], as already appears, is covered by Section 1(14)(a)." This language also negatively an-

swers the suggestion that power to set compensation is impliedly in Section 1(10) or 1(11). Cf. also *Palmer* v. *United States,* 75 Fed. Supp. 63.

It is my considered judgment that, if the Commission has the power to enter an order such as this, without compliance with the requirements of Section 1(14)(a) the will of Congress has been thwarted. The obvious result of this order of the Commission is to grant to the credit balance roads unlimited power to boost per diem rates. Because of the organization of the Association of American Railroads and the voting proecdures used in setting per diem rates, the debit balance railroads, under the order entered by the Commission, are the captives of the credit-balance roads and, because of the "car service" rules and the economic facts of railroad life, they cannot buy enough freight cars to obtain enough votes to control per diem rate setting within the General Committee of the Association of American Railroads.

It may also be noted that the eastern railroads described in this petition have approximately 16,000 freight cars and these roads are all debit car railroads while the large shipping credit car railroads have cars which run into the hundreds of thousands. This becomes important in view of the fact that there is an obligation devolving upon the debit car railroads to use cars owned by the credit car railroads for shipping purposes before they can utilize their own. This is only one viewpoint of the many angles that were thoroughly disregarded by the Interstate Commerce Commission when they disregarded the recommendations of the examiner and accepted "in toto" the rates set by the American Association of Railroads.

Section 1(14)(a) is intended to negative the possibility of the issuance of any order such as we have here—an order which is, in truth, merely a rubber stamp of a decision already made by the stronger of two economic groups. Here, we have an instance of an abandonment of its functions by the Commission altogether in favor of the long-haul trunk line railroads. The Commission in the exercise of its duties has taken the simple way out. Substance has given way to mere form.

Decision that jurisdiction may be found only within the confines of Section 1(14)(a) would obviate the possibility of the Commission surrendering its powers and duties by seeking the easy way.

Congress has spoken only twice as to per diem rates. The first was in Section 1(14)(a) which carries with it the requirement that the Commission conduct an investigation through its impartial experts. The second was in the Bulwinkle Act which authorized the organization of a private association with the approval of the Commission and which excepted rates set by this private association from the sway of the Sherman Anti-Trust law, but only so long as non-assenters were free to refuse to follow the rates set by the association and to bargain independently. The order before the Court does not set rates in accord with Section 1(14)(a) and the order before the Court does not come within the purview of the Bulwinkle Act, since the effect of the order is to require compliance with the established rates by all railroads, assenters and non-assenters alike.

It should be noted that the Congress has provided for adequate safeguards in each situation. Under Section

1(14)(a) rates may be set only after an impartial investigation conducted by a corps of experts available at all times in the personnel of the Interstate Commerce Commission; under the Bulwinkle Act the non-assenters are free to bargain independently. If the order of the Commission here should be rubber-stamped these safeguards would be lost and the clearest of anti-trust violations by illegal price fixing would be endorsed.

That part of the declaratory order here under review which states that the per diem charges were charges which could have been established under Section 1(14)(a) and that lower charges would not be compensatory is not an escape hatch which this Court can use for the following reasons.

1. The fact that the charges could have been established under Section 1(14)(a) is not enough for the Commission to endorse them. Under that section the Commission could not establish rates retroactively.

2. The fact that the Commission finds that lower rates would not be compensatory is not enough because this finding, if it is such, is not based on the impartial investigation which would have been held had the Commission acted under the said section.

I would therefore vacate the order of the Interstate Commerce Commission because it is without jurisdiction. To arrive at any other conclusion is tantamount to saying that the Commission can close one legislative gap after another. The history of the Act leads only to one conclusion and that is that these gaps cannot be closed except by the Congress of the United States.

Judgment of the District Court

UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

Civil Action No. 56-1004

BOSTON & MAINE RAILROAD, *et al.*

vs.

UNITED STATES OF AMERICA

and

INTERSTATE COMMERCE COMMISSION

JUDGMENT

This cause having come on to be heard on the plaintiffs' complaint seeking to enjoin, set aside, and annul a report and order issued by the Interstate Commerce Commission, dated October 17, 1955, (petition for reconsideration, re-argument and further hearing denied July 16, 1956) in a proceeding known as *Chicago, Burlington & Quincy Railroad Company, et al* v. *New York, Susquehanna & Western Railroad Company, et al.*, I. C. C. Docket No. 31358, and the United States of America and the Interstate Commerce Commission having filed answers, and other parties having intervened, and all parties and intervenors being agreed (and the Court having found) that there is no genuine issue as to any material fact, and the Court having heard counsel, and the Court having concluded in an opinion by Judge

Woodbury that plaintiffs are entitled to judgment as a matter of law.

It is hereby ORDERED, ADJUDGED AND DECREED:

That the order issued by the Interstate Commerce Commission, dated October 17, 1955, is set aside and vacated and the cause is remanded to the Commission for further proceedings not inconsistent with the aforesaid opinion of Judge Woodbury.

That the plaintiffs shall recover their costs of $ in this Court.

Issued at Boston, Massachusetts, this 5th day of May, 1958.

s/ PETER WOODBURY

Judge of the United States Court of Appeals

s/ CHARLES E. WYZANSKI, JR.

Judge of the United States District Court

Judge of the United States District Court

APPENDIX B

Statutes Involved

Administrative Procedure Act:

DEFINITIONS

SEC. 2. [60 Stat. 237 as amended; *5 U. S. C., §1001.*] As used in this Act—

(a) AGENCY.—"Agency" means each authority (whether or not within or subject to review by another agency) of the Government of the United States other than Congress, the courts, or the governments of the possessions, Territories, or the District of Columbia. Nothing in this Act shall be construed to repeal delegations of authority as provided by law. * * *

(b) PERSON AND PARTY.—"Person" includes individuals, partnerships, corporations, associations, or public or private organizations of any character other than agencies. "Party" includes any person or agency named or admitted as a party, or properly seeking and entitled as of right to be admitted as a party, in any agency proceeding; but nothing herein shall be construed to prevent an agency from admitting any person or agency as a party for limited purposes.

(c) RULE AND RULE MAKING.—"Rule" means the whole or any part of any agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or to describe the organization, procedure, or practice requirements of

any agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing upon any of the foregoing. "Rule making" means agency process for the formulation, amendment, or repeal of a rule.

(d) ORDER AND ADJUDICATION.—"Order" means the whole or any part of the final disposition (whether affirmative, negative, injunctive, or declaratory in form) of any agency in any matter other than rule making but including licensing. "Adjudication" means agency process for the formulation of an order.

* * *

(f) SANCTION AND RELIEF.—"Sanction" includes the whole or part of any agency (1) prohibition, requirement, limitation, or other condition affecting the freedom of any person; (2) withholding of relief; (3) imposition of any form of penalty or fine; (4) destruction, taking, seizure, or withholding of property; (5) assessment of damages, reimbursement, restitution, compensation, costs, charges, or fees; (6) requirement, revocation, or suspension of a license; or (7) taking of other compulsory or restrictive action. "Relief" includes the whole or part of any agency (1) grant of money, assistance, license, authority, exemption, exception, privilege, or remedy; (2) recognition of any claim, right, immunity, privilege, exemption, or exception; or (3) taking of any other action upon the application or petition of, and beneficial to, any person.

(g) AGENCY PROCEEDING AND ACTION.—"Agency proceeding" means any agency process as defined in subsections

(c), (d), and (e) of this section. "Agency action" includes the whole or part of every agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act.

RULE MAKING

SEC. 4. [60 Stat. 238; *5 U. S. C., §1003.*] Except to the extent that there is involved (1) any military, naval, or foreign affairs function of the United States or (2) any matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts—

(a) NOTICE.—General notice of proposed rule making shall be published in the Federal Register (unless all persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law) and shall include (1) a statement of the time, place, and nature of public rule making proceedings; (2) reference to the authority under which the rule is proposed; and (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved. Except where notice or hearing is required by statute, this subsection shall not apply to interpretative rules, general statements of policy, rules of agency organization, procedure, or practice, or in any situation in which the agency for good cause finds (and incorporates the finding and a brief statement of the reasons therefor in the rules issue) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(b) PROCEDURES.—After notice required by this section, the agency shall afford interested persons an opportunity to participate in the rule making through submission of

written data, views, or arguments with or without opportunity to present the same orally in any manner; and, after consideration of all relevant matter presented, the agency shall incorporate in any rules adopted a concise general statement of their basis and purpose. Where rules are required by statute to be made on the record after opportunity for an agency hearing, the requirements of sections 7 and 8 shall apply in place of the provisions of this subsection.

(c) EFFECTIVE DATES.—The required publication or service of any substantive rule (other than one granting or recognizing exemption or relieving restriction or interpretative rules and statements of policy) shall be made not less than thirty days prior to the effective date thereof except as otherwise provided by the agency upon good cause found and published with the rule.

(d) PETITIONS.—Every agency shall accord any interested person the right to petition for the issuance, amendment, or repeal of a rule.

ADJUDICATION

SEC. 5 [60 Stat. 239; *5 U. S. C., §1004.*] In every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing, except to the extent that there is involved (1) any matter subject to a subsequent trial of the law and the facts de novo in any court; (2) the selection or tenure of an officer or employee of the United States other than examiners appointed pursuant to section 11; (3) proceedings in which decisions rest solely on inspections, tests, or elections; (4) the conduct of military, naval, or foreign affairs functions;

(5) cases in which an agency is acting as an agent for a court; and (6) the certification of employee representatives—

(a) NOTICE.—Persons entitled to notice of an agency hearing shall be timely informed of (1) the time, place, and nature thereof; (2) the legal authority and jurisdiction under which the hearing is to be held; and (3) the matters of fact and law asserted. In instances in which private persons are the moving parties, other parties to the proceeding shall give prompt notice of issues controverted in fact or law; and in other instances agencies may by rule require responsive pleading. In fixing the times and places for hearings, due regard shall be had for the convenience and necessity of the parties or their representatives.

(b) PROCEDURE.—The agency shall afford all interested parties opportunity for (1) the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment where time, the nature of the proceeding, and the public interest permit, and (2) to the extent that the parties are unable so to determine any controversy by consent, hearing, and decision upon notice and in conformity with sections 7 and 8.

(c) SEPARATION OF FUNCTIONS.—The same officers who preside at the reception of evidence pursuant to section 7 shall make the recommended decision or initial decision required by section 8 except where such officers become unavailable to the agency. Save to the extent required for the disposition of ex parte matters as authorized by law, no such officer shall consult any person or party on any fact in issue unless upon notice and

opportunity for all parties to participate; nor shall such officer be responsible to or subject to the supervision or direction of any officer, employee, or agent engaged in the performance of investigative or prosecuting functions for any agency. No officer, employee, or agent engaged in the performance of investigative or prosecuting functions for any agency in any case shall, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review pursuant to section 8 except as witness or counsel in public proceedings. This subsection shall not apply in determining applications for initial licenses or to proceedings involving the validity or application of rates, facilities, or practices of public utilities or carriers; nor shall it be applicable in any manner to the agency or any member or members of the body comprising the agency.

(d) DECLARATORY ORDERS.—The agency is authorized in its sound discretion, with like effect as in the case of other orders, to issue a declaratory order to terminate a controversy or remove uncertainty.

SANCTIONS AND POWERS

SEC. 9 [60 Stat. 242; *5 U. S. C., §1008.*] In the exercise of any power or authority—

(a) IN GENERAL.—No sanction shall be imposed or substantive rule or order be issued except within jurisdiction delegated to the agency and as authorized by law.

Interstate Commerce Act

SEC. 1, pars. 10, 11, 14(a) [40 Stat. 101 as amended; *49 U. S. C., §1(10)-(11)-(14)(a).*]

(10) The term "car service" in this part shall include the use, control, supply, movement, distribution, exchange, interchange, and return of locomotives, cars, and other vehicles used in the transportation of property, including special types of equipment, and the supply of trains, by any carrier by railroad subject to this part.

(11) It shall be the duty of every carrier by railroad subject to this part to furnish safe and adequate car service and to establish, observe, and enforce just and reasonable rules, regulations, and practices with respect to car service; and every unjust and unreasonable rule, regulation, and practice with respect to car service is prohibited and declared to be unlawful.

(14) (a) The Commission may, after hearing, on a complaint or upon its own initiative without complaint, establish reasonable rules, regulations, and practices with respect to car service by common carriers by railroad subject to this part, including the compensation to be paid and other terms of any contract, agreement, or arrangement for the use of any locomotive, car, or other vehicle not owned by the carrier using it (and whether or not owned by another carrier), and the penalties or other sanctions for nonobservance of such rules, regulations, or practices.

SEC. 5a [62 Stat. 472; *49 U. S. C.*, §*5b.*]

(1) For purposes of this section—

(A) The term "carrier" means any common carrier subject to part I, II, or III, or any freight forwarder subject to part IV, of this Act; and

(B) The term "antitrust laws" has the meaning assigned to such term in section 1 of the Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes", approved October 15, 1914.

(2) Any carrier party to an agreement between or among two or more carriers relating to rates, fares, classifications, divisions, allowances, or charges (including charges between carriers and compensation paid or received for the use of facilities and equipment), or rules and regulations pertaining thereto, or procedures for the joint consideration, initiation or establishment thereof, may, under such rules and regulations as the Commission may prescribe, apply to the Commission for approval of the agreement, and the Commission shall by order approve any such agreement (if approval thereof is not prohibited by paragraph (4), (5), or (6)) if it finds that, by reason of furtherance of the national transportation policy declared in this Act, the relief provided in paragraph (9) should apply with respect to the making and carrying out of such agreement; otherwise the application shall be denied. The approval of the Commission shall be granted only upon such terms and conditions as the Commission may prescribe as necessary to enable it to grant its approval in accordance with the standard above set forth in this paragraph.

(3) Each conference, bureau, committee, or other organization established or continued pursuant to any agreement approved by the Commission under the provisions of this section shall maintain such accounts, records, files, and memoranda and shall submit to the Commission, such reports, as may be prescribed by the Commission, and all such accounts, records, files, and memoranda shall be subject to inspection by the Commission or its duly authorized representatives.

(4) The Commission shall not approve under this section any agreement between or among carriers of different classes unless it finds that such agreement is of the character described in paragraph (2) of this section and is limited to matters relating to transportation under joint rates or over through routes; and for purposes of this paragraph carriers by railroad, express companies, and sleeping-car companies are carriers of one class; pipeline companies are carriers of one class; carriers by motor vehicle are carriers of one class; carriers by water are carriers of one class; and freight forwarders are carriers of one class.

(5) The Commission shall not approve under this section any agreement which it finds is an agreement with respect to a pooling, division, or other matter or transaction, to which section 5 of this Act is applicable.

(6) The Commission shall not approve under this section any agreement which establishes a procedure for the determination of any matter through joint consideration unless it finds that under the agreement there is accorded to each party the free and unrestrained right to take

independent action either before or after any determination arrived at through such procedure.

(7) The Commission is authorized, upon complaint or upon its own initiative without complaint, to investigat and determine whether any agreement previously approved by it under this section, or terms and conditions upon which such approval was granted, is not or are not in conformity with the standard set forth in paragraph (2), or whether any such terms and conditions are not necessary for purposes of conformity with such standard, and, after such investigation, the Commission shall by order terminate or modify its approval of such agreement if it finds such action necessary to insure conformity with such standard, and shall modify the terms and conditions upon which such approval was granted to the extent it finds necessary to insure conformity with such standard or to the extent to which it finds such terms and conditions not necessary to insure such conformity. The effective date of any order terminating or modifying approval, or modifying terms and conditions, shall be postponed for such period as the Commission determines to be reasonably necessary to avoid undue hardship.

(8) No order shall be entered under this section except after interested parties have been afforded reasonable opportunity for hearing.

(9) Parties to any agreement approved by the Commission under this section and other persons are, if the approval of such agreement is not prohibited by paragraph (4), (5), or (6), hereby relieved from the operation of the antitrust laws with respect to the making of such agreement, and with respect to the carrying out of such

agreement in conformity with its provisions and in conformity with the terms and conditions prescribed by the Commission.

(10) Any action of the Commission under this section in approving an agreement, or in denying an application for such approval, or in terminating or modifying its approval of an agreement, or in prescribing the terms and conditions upon which its approval is to be granted, or in modifying such terms and conditions, shall be construed as having effect solely with reference to the applicability of the relief provisions of paragraph (9).

SEC. 13(1) [24 Stat. 383 as amended; *49 U. S. C., §13(1).*]

(1) That any person, firm, corporation, company, or association, or any mercantile, agricultural, or manufacturing society or other organization, or any body politic or municipal organization, or any common carrier, complaining of anything done or omitted to be done by any common carrier subject to the provisions of this part, in contravention of the provisions thereof, may apply to said Commission by petition, which shall briefly state the facts; whereupon a statement of the complaint thus made shall be forwarded by the Commission to such common carrier, who shall be called upon to satisfy the complaint, or to answer the same in writing, within a reasonable time, to be specified by the Commission. If such common carrier within the time specified shall make reparation for the injury alleged to have been done, the common carrier shall be relieved of liability to the complainant only for the particular violation of law thus complained of. If such carrier or carriers shall not satisfy the complaint within

the time specified, or there shall appear to be any reasonable ground for investigating said complaint, it shall be the duty of the Commission to investigate the matters complained of in such manner and by such means as it shall deem proper.

SEC. 15(2) [34 Stat. 589 as amended; *49 U. S. C., §15(2).*]

(2) Except as otherwise provided in this part, all orders of the Commission, other than orders for the payment of money, shall take effect within such reasonable time, not less than thirty days, and shall continue in force until its further order, or for a specified period of time, according as shall be prescribed in the order, unless the same shall be suspended or modified or set aside by the Commission, or be suspended or set aside by a court of competent jurisdiction.

SEC. 16(1) [34 Stat. 590 as amended; *49 U. S. C., §16(1).*]

(1) That if, after hearing on a complaint made as provided in section thirteen of this part, the Commission shall determine that any party complainant is entitled to an award of damages under the provisions of this part for a violation thereof, the Commission shall make an order directing the carrier to pay to the complainant the sum to which he is entitled on or before a day named.

Sherman Act

SEC. 1. [26 Stat. 209 as amended; 15 U. S. C., §1.] Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal: *Provided,* That nothing

herein contained shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trade mark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 5, as amended and supplemented, of the Act entitled "An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes", approved September 26, 1914: *Provided further,* That the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or betwen factors, or between retailers, or between persons, firms, or corporations in competition with each other. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

SEC. 2. [26 Stat. 209 as amended; 15 U. S. C., §2.] Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

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AUG 27 1958
JAMES R. BROWNING, Clerk

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1958

No. 310

BOSTON AND MAINE RAILROAD; THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY; THE NEW JERSEY AND NEW YORK RAILROAD COMPANY, HORACE BANTA, Trustee; THE LONG ISLAND RAIL ROAD COMPANY,

Appellants,

against

UNITED STATES OF AMERICA; INTERSTATE COMMERCE COMMISSION *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS.

SUPPLEMENT TO APPENDIX A TO JURISDICTIONAL STATEMENT

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INTERSTATE COMMERCE COMMISSION

No. 31358

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY ET AL.

v.

NEW YORK, SUSQUEHANNA & WESTERN RAILROAD COMPANY ET AL.

Decided October 17, 1955.

Per diem charges of $1.75, $2, and $2.40 for the use of railroad-owned freight cars when on the lines of rail carriers other than their owners, found not in excess of reasonable compensation. Proceeding discontinued.

S. R. Brittingham, Jr., R. R. Bongartz, Carson L. Taylor, J. P. Fishwick, L. J. Huegel, F. E. Baukhages, C. C. Howell, R. B. Gwathmey, E. H. Burgess, D. O. Mathews, Eldon Martin, Edwin C. Matthias, D. S. Wright, B. J. Viviano, Thomas T. Railey, H. Merle Mulloy, J. L. Homire, Seddon G. Boxley, J. T. Suggs, W. C. Plunkett, E. S. Davis, J. H. Miller, J. L. Rice, A. C. Scott, R. S. Outlaw, J. H. Wright, E. J. Zoll, Jr.,

J. Carter Fort, Jr., Alfred W. Hesse, Jr., Martin A. Meyer, Jr., and *George W. Holmes* for complainants.

Hewitt Biaett, J. C. Kauffman, David L. Farley, Jr., Ross L. Thorfinnson, W. H. Parsons, Prime F. Osborn, III, Thormund A. Miller, M. C. Smith, Jr., Robert D. Brooks, John Colgren, Kemper A. Dobbins, Warren H. Ploeger, W. H. Fitzpatrick, John F. Reilly, Paul F. Robinson, Martin L. Cassell, Eaton Adams, Francis J. Melia, D. D. Dart, M. L. Countryman, Jr., Matthew Crawford, and *Milton Ferguson* for interveners in support of complainants.

Carl E. Newton, Granville Whittlesey, Jr., W. J. Hickey, J. M. Hood, J. W. Grady, W. J. Myskowski, H. D. Boynton, Richard Jackson, Lawrence Chaffee, William A. Colton, Richard Swan Buell, and *Joseph P. Hawryluk* for defendants.

W. J. Hickey for interveners in support of defendants.

REPORT OF THE COMMISSION

BY THE COMMISSION:

Exceptions to the report proposed by the examiner, and replies thereto, were filed by the parties, except interveners listed in the footnote.[1] We have heard oral argument. Our conclusions differ in part from those of the examiner. Exceptions and requested findings not specifically discussed

[1] The following carriers intervened in support of the complainants but did not join in their exceptions: Erie Railroad Company, Minneapolis, St. Paul and Sault Ste. Marie Railroad Company, Southern Pacific Company, Texas and New Orleans Railroad Company, Western Maryland Railway Company, and The Pittsburgh & Shawmut Railroad Company.

in this report nor reflected in our findings or conclusions have been considered and found not justified.

This complaint was filed on September 21, 1953, by 19 of the larger class-I railroads.[2] The defendants include, among others, 5 class-I railroads: Boston and Maine Railroad; The Long Island Railroad Company (William Wyer, Trustee), called the Long Island; The New York, New Haven and Hartford Railroad Company, called the New Haven; New York, Susquehanna & Western Railroad Company, called the Susquehanna; and Rutland Railway Corporation. Six short-line railroads are also defendants: Atlantic & East Carolina Railway Company; Barre and Chelsea Railroad Company; East Tennessee and Western North Carolina Railroad Company; St. Johnsbury & Lamoille County Railroad; The New Jersey and New York Railroad Company (Horace Banta, Trustee); and Mississippi & Skuna Valley Railroad Company. The last-named defendant is a class-III railroad; the preceding 5 are class-II lines.

There are 15 interveners in behalf of the complainants, all of them being class-I railroads. The interveners in be-

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[2] The Atchison, Topeka and Santa Fe Railway Company, Atlantic Coast Line Railroad Company, The Baltimore and Ohio Railroad Company, Chicago & Eastern Illinois Railroad Company, Chicago, Burlington & Quincy Railroad Company, Chicago, Milwaukee, St. Paul & Pacific Railroad Company, Great Northern Railway Company, Gulf, Mobile & Ohio Railroad Company, Illinois Central Railroad Company, Lehigh Valley Railroad Company, Missouri Pacific Railroad Company (Guy A. Thompson, Trustee), Norfolk and Western Railway Company, The Pennsylvania Railroad Company, Reading Company, The St. Louis-San Francisco Railway Company, Southern Railway Company, The Texas and Pacific Railway Company, The Virginian Railway Company, and Wabash Railroad Company.

half of the defendants, 56 in number, are rail carriers principally in classes II and III. All of the interveners are listed in the appendix hereto.

The complaint grows out of a disagreement between the complainants and the defendants concerning the reasonableness of per diem charges for the use of railroad-owned freight cars payable by nonowning railroads. In *Alabama, T. & N. R. Co.* v. *Aberdeen & R. R. Co.*, 274 I.C.C. 383, decided July 11, 1949, hereinafter referred to as the 1949 report, we found that the per diem charge of $1.50 per day then in effect was not shown to be either unreasonably high or unreasonably low. Effective on November 1, 1949, that charge was increased to $1.75 by action of members of the Association of American Railroads, hereinafter called the AAR, under procedure described in the 1949 report.

The procedure for establishing per diem charges was considered by division 2 in *Association of American Railroads—Agreement*, 277 I.C.C. 413, and approved as conforming to section 5a of the Interstate Commerce Act. The report included the following paragraph:

> Articles XI and XII accord to each subscriber certain individual rights. The former states that the agreement shall not be construed to prevent or limit recourse to this Commission by any subscriber for any relief (in pending proceedings, or otherwise) accorded by law in respect of any of the matters covered thereby. The latter (article XII) provides that all subscribers shall have the free and unrestrained right to take independent action either before or after any determination arrived at though the procedure provided for in the agreement.

This agreement became effective on October 7, 1950. Under the procedure which it set up the per diem charge was increased to $2, effective on May 1, 1952, and to $2.40 on August 1, 1953.

The Susquehanna, which was not a party to the agreement, notified the complainants in March 1951 that after April 1 of that year it would refuse to pay the charge of $1.75 but would settle on a graduated scale ranging from $1.20 to $2, depending on the age of the car. In 1953 it offered to increase that scale to a range between $1.33 and $2.21. The complainants refused those offers, and the car rentals payable by the Susquehanna are now involved in a number of pending lawsuits.

In June 1953 the Boston & Maine, the New Haven, and the Rutland gave notice of their refusal to pay the charge of $2.40, as well as the former $2 charge after July 31, 1954. Later, the Boston & Maine offered to pay on a graduated basis or a flat rate of $1.72 per day. The Long Island in August 1953 advised that it was willing to continue paying a $2 charge but would not recognize the $2.40 charge. The Atlantic & East Carolina, St. Johnsbury & Lamoille County, New Jersey & New York, and Barre & Chelsea have followed a similar course. The situation with respect to present payments by the defendants other than those here named is not disclosed.

It is alleged in the complaint that, to the extent that the defendants have paid and are paying or offering to pay charges less than those generally in effect as above indicated, "such payments have been, are and would be unjust, unreasonable and noncompensatory, in violation of para-

graphs (4), (10), and (11) of section 1 of the Act; and such action by defendants has been, is and would be disruptive of the 'uniform national basis' of handling per diem, which has been deemed necessary by the Commission in order to facilitate 'the performance of orderly transportation service by railroad in the public interest.' *Association of American Railroads—Agreement, supra,* 423." The prayer of the complaint is that—

> the Commission find and declare that the per diem rates of $1.75 and $2, during the periods in which these rates were effective, were just, reasonable, and otherwise lawful, that the current per diem rate of $2.40, effective August 1, 1953, is just, reasonable and otherwise lawful, and that the performance of orderly transportation service by railroad in the public interest requires uniform observance of such rates by defendants together with other carriers; and that the Commission grant such other and further relief as may be required in the premises.

The complainants expressly disclaim any intention to invoke the only specific power with respect to per diem which we have, namely, in section 1 (14)(a) of the Interstate Commerce Act to establish "the compensation to be paid and other terms of any contract, agreement, or arrangement for the use of any locomotive, car, or other vehicle not owned by the carrier using it (and whether or not owned by another carrier, * * *." Such action would involve the entry of an order, which presumably would continue in effect for the indefinite future and, unless it were vacated or modified, would render the present procedure for dealing with per diem charges inoperative.

In one of the complaints considered in our 1949 decision, No. 29587, the complainants, which were short-line railroads, asked that we promulgate a formula to be employed in the future in determining the lawful compensation to be paid for the use of railroad-owned freight cars. The pleadings in the instant case raised no such issue.

In a joint answer to the complaint filed by the Boston & Maine, the New Haven, and certain short-line defendants, these parties ask "that the Comimssion find and determine and fix by order the rate or rates for the use of freight cars to be paid by complainants to defendants and by defendants to complainants." The short-line defendants and interveners requested in their briefs that we determine and definitely fix the amount of compensation to be paid by a rail carrier when it uses the freight cars of another, but the briefs of the other defendants were less positive.

The New Haven and the Boston & Maine asked for a declaration that the present per diem rate is unlawful and as a maximum should not be more than $1.04 per day if it is to be fixed as a single amount. Alternatively, they expressed preference for a graduated scale. The Susquehanna asked principally that the graduated scale which it favored be found not unreasonably low or noncompensatory. The Long Island and the New Jersey & New York urged that the complaint be dismissed, and asserted that we are not empowered to prescribe charges for car hire retroactively.

In their exceptions to the proposed report, the defendants generally go beyond the positions taken in their briefs above described, and request that a formula for the determination of per diem charges be prescribed. Under such a formula,

according to one of the defendants, "the carriers would be required to get exact and complete figures and to make the computations themselves, with the right of recourse to the Commission in the event an agreement could not be reached." This contention is outside the scope of the proceeding as developed in the pleadings, and such a disposition would hardly be desirable except in a proceeding to which all rail carriers were parties.

At a prehearing conference it was suggested that findings such as those sought by the complainants might be in the nature of a declaratory order, as authorized by section 5(d) of the Administrative Procedure Act. Later, some of the defendants, as above pointed out, made requests for findings which appeared to be of the same nature. In exceptions to the proposed report, which recommended action under that section, the defendant New Haven questions the applicability of a declaratory order to the present controversy.

The declaratory order is a relatively new administrative remedy, and no definite limits to its use as yet have been set. The power of issuance is committed to the agency "in its sound discretion . . . to terminate a controversy or remove uncertainty." Manifestly, a controversy exists here, and we consider that a declaratory order would be appropriate.

With the exception of our decision in *Increased Per Diem Charge on Freight Cars*, 268 I.C.C. 659, which was set aside on judicial review (*Palmer* v. *United States*, 75 F. Supp. 63), we have never undertaken to establish a general basis of per diem charges under our authority in section 1(14)(a)

of the act, but have considered such charges in a number of cases arising on formal complaints. The present system of rentals in its broad form has been worked out by the railroads themselves. The per diem plan was adopted in 1902 after a mileage system was found to be unsatisfactory for reasons mentioned in *Rules for Car-Hire Settlement,* 160 I.C.C. 369, 375. The charge has been uniform for all types of freight cars, and up to the time of the present controversy it has applied uniformly to all railroads, subject to the operation of reclaims. In our 1949 report (page 386), we said:

> For many years the per diem rate has been based on average costs. The daily rental for a car valued at $2,000, for example, is the same as that for a car worth twice as much. There is no request herein for different per diem rates on freight cars of different ages, sizes, or classes. A carrier which has a foreign railroad car on its rails immediately after midnight pays the rental for that calendar day in the absence of some special agreement. If it receives a car in interchange after midnight and delivers it in interchange before the following midnight, it does not pay any car rental.

Some of the defendants here question the principle of uniformity and introduce evidence in support of their views. These will be discussed before the main issues in the case are considered.

Both the Long Island and the New Jersey & New York, whose lines are partly in the metropolitan area of New York City, perform comparatively short line hauls in their freight service. The average detention per car in their

terminals is high. These defendants believe that the basis of per diem charges should take into account a distinction between items of car-ownership cost attributable to movement use (mileage) and those related to the passage of time. They therefore suggest a basis under which "each using road would pay time costs in proportion to the time that it holds the car and mileage costs in proportion to its own mileage use of the car."

Unless we dismiss the complaint, the Long Island and the New Jersey & New York urge that we

> (a) undertake to determine true freight car ownership costs * * *; (b) make an accurate separation of such costs between time and mileage; (c) determine separate average unit costs for time and mileage; and
>
> (d) fix separate car hire charges for each user road reflecting the average time and mileage costs for which such road is responsible.

Admittedly, such a determination could not be made from the evidence in this case; moreover, it would involve a long and complicated statistical undertaking. If by that means a scheme of equitable separate charges for individual user roads could be devised, there would be an increase in the labor now required for settling per diem accounts.

The New Haven and the Boston & Maine suggest a plan of per diem charges under which there would be a variation of rates with respect to owner railroads based on the average age of their cars. The Susquehanna also supports this suggestion. According to the sponsors, this plan "by giving higher rent for new than for old cars would furnish

an incentive to car owners to renew the fleet and to get rid of old equipment." The steps necessary to carry out the plan are stated as follows:

> Mr. Glacy's program assumed that in each year the AAR would ascertain for each owning railroad the inventory of its cars; ascertain for each group of cars of each railroad the proper charge per day; and derive for each railroad a composite figure which was the weighted average rate per day for its entire fleet. The AAR would then publish a booklet showing each owning railroad's composite rate, which would be the basis.

This plan, too, would necessitate a complicated statistical operation to ascertain the proper composite figure, and it may well be doubted whether the clerical labor required in computing per diem credits would be as simple as the sponsors believe.

As above indicated, the suggested plans for varying per diem charges could not be put into effect without an extensive investigation either by this Commission or by the AAR. The facts and arguments here presented are not persuasive that plans of this kind are desirable.

There is general agreement that car rentals, however established, should be reasonably compensatory and no more. *Palmer* v. *United States*, *supra*, page 69. The determination is basically a problem in cost accounting. The earliest attempt to deal exhaustively with the problem was made 45 years ago by the so-called McCrea Commission, composed of 5 railroad presidents. They adopted the prin-

ciple that the per diem charge should cover repairs, taxes, depreciation, interest on investment, and miscellaneous expense incidental to ownership. This principle has been generally accepted as valid ever since, but there has been continuing controversy as to how it should be applied. Indeed, the members of the McCrea Commission themselves reached three different conclusions on that point.

The principle just referred to serves as a guide for the General Committee of the AAR, which is charged with studying proposals for changes in per diem rates, aided by a subordinate special committee, known as the Subcommittee on Mileage and Per Diem. Costs are allocated to the various categories from expense figures reported to the committees in response to questionnaires sent to car-owning railroads. The General Committee alone decides what proposed changes in the per diem rate shall be recommended to the Board of Directors of the AAR for submission to subscribers to the per diem agreement.

In the 1949 report, we discussed the allocations of costs for 1946 presented in support of the per diem charge of $1.50 there in issue. We criticized some of the allocations as too large, but in respect of other important items we made comments which have been interpreted as finding that those items were understated.

In that report, however, we dismissed the complaint in No. 29587, filed by the short lines, in which we were asked, among other things, "to promulgate a formula to be employed in the future in determining the lawful compensa-

tion to be paid for the use of railroad-owned freight cars." Also, we dismissed the complaint in No. 29751, in which 6 large western rail carriers took the position that the per diem charge of $1.50 was "inadequate, unjust, and noncompensatory."

In this case the complainants seek findings which would approve all per diem charges established after the 1949 report. In each instance the General Committee studied statistics reported by class I railroads in response to questionnaires. Those upon which the charge of $1.75 was based were for 1948, but there was an adjustment to reflect wage rates, material prices, payroll taxes, and other determinable increases up to September 1, 1949.

The statistics pertaining to the $2 charge were those for 1950, projected to include cost levels as of April 1951. Full recognition was thus given to the 40-hour week, which was in effect throughout 1950. The present charge of $2.40 was based on figures for 1952. The information for the latter year was received from 121 railroads, having approximately all the freight-car ownership of class I railroads. Concerning the latest study, the complainants' principal witness asserted that it "came closer to applying the Commission formula [1949 report] than any of its previous studies leading to a per diem adjustment."

Freight car repairs. This is the largest single category of expense included in the per diem charge and amounts to about 40 per cent of the total. Also, it is used as a basis of allocating certain other costs. The basic figures for this

item are derived from account 314, Freight Train Cars—Repairs, in the accounting classification. The reported total for 1952 was $586,914,603. To this the General Committee added $24,965,504 for switching home freight cars marked for repairs, and deducted $65,887,034 for costs of car users' repairs to foreign cars damaged by them through improper handling, compensation for foreign cars destroyed on car users' lines, certain switching costs, and a portion of labor costs of inspection and other service at terminal junction points. The reasons for these adjustments were stated on pages 390 and 391 of the 1949 report. The complainants thus estimate the cost of repairs at 97.836 cents per active car-day.

In the 1949 report we found that there should have been a further deduction of the costs incurred by car users for inspection of foreign cars not charged back to car owners. Applied to the 1952 study, the deduction would amount to only about 5 cents per day, a relatively small figure. The complainants have not seen fit to consider this deduction as a part of what they regard as our formula, approved or prescribed in the 1949 report. They argue:

> It is technically true that the expense is not one which the owner bears immediately and directly but it is one which the owner bears vicariously and by substitution; and nonowners should not be shielded from the impact of this ownership burden.

The defendants contend that there should be even larger deductions for the expense of car inspection now included

in account 314. Some of the defendants would eliminate all inspection costs on the ground, as stated by one of them, that "inspection is obviously primarily for purposes of operation and safety, and with the primary objective of preventing breakdowns in transportation on the inspecting line, which is the line which is using the cars." Such a sweeping generalization can not be sustained. The instructions published in connection with the accounting classification direct that "the cost of repairs * * * shall include the cost of inspecting to determine the repairs necessary and * * * the cost of inspecting and testing after repairs have been made * * * to determine whether the repairs have been properly made." The cost witness for the short-line parties in effect conceded that inspection costs of this kind may properly be considered maintenance. If there is to be any segregation of inspection costs as between maintenance and transportation, it should follow an authoritative study.

In the 1949 report we said (page 391):

> Numerous repairs are applied to freight cars when on the lines of railroads other than their owners, and, except for the relatively few due to defects for which the using line is responsible by reason of improper handling, commonly called no-bill repairs, definite sums published in connection with the freight-car interchange rules may be billed against and collected from the owning railroads. Such amounts are revised from time to time, to correspond with changes in labor and material costs, but as the published revisions lag behind changes

in price levels, the actual costs, in a period of rising prices, of supplying materials and applying repairs to foreign cars may, and frequently do, exceed the amounts that may be recovered.

Some of the defendants contend that losses which they and other carriers incur because of their inability to recoup full costs of these repairs, both on foreign per diem cars and on mileage cars, should be deducted from the total car-repair costs. It is testified for the Boston & Maine that this deficiency is equivalent to nearly 30 per cent of its charges to account 314, and applying this percentage to aggregate car-repair costs of $586,914,603 used in the complainant's study, it suggests the elimination of $175,006,186 from that aggregate. It would be very hazardous to make any such adjustment in the absence of fairly complete information bearing on this suggestion. Other defendants more cautiously suggest only that the situation should be investigated. This attitude seems to be reflected in the recommendation of the Susquehanna that "there should be segregated and eliminated from ownership cost figures all amounts spent by users for the maintenance of cars which are not recoverable by the user from the owner."

The various defendants introduced four cost studies in which the aggregate car-repair figures there shown differ widely. That of the short-line parteis shows a total of $498,922,522. The figure in the New Haven study is $457,610,831. Much lower are those of the Boston & Maine, $259,486,694, and of the Susquehanna, $217,158,403. Each

of the witnesses who presented these studies is a man of long experience in this field. The wide variations in these figures apparently reflect individual differences in respect of reliance upon conjectural factual data.

Some conjecture of this kind is inescapable because of the comprehensive nature of account 314. It is the largest of the primary operating expense accounts, embracing nearly 10 per cent of total freight expense. It includes "the net loss sustained on account of the destruction of foreign cars" and "amounts paid to others for repairs of freight cars for which the carrier is liable." Among the freight cars covered by the account are cabooses and refrigerator cars. As of November 1, 1953, however, 96.5 per cent of the cars owned by class I carriers consisted of box, gondola, hopper, stock, and flat cars, subject to per diem.

The Subcommittee on Mileage and Per Diem, in 1951, came to the conclusion that a proper diem charge could be more readily determined if account 314 could be subdivided, and recommended that all the railroads do so beginning with 1952. The Subcommittee found that there was "considerable variation in the practices of various railroads in the charging of inspection costs as between account 314 and account 402." It was of the view that "it would be better if car repairs for cabooses could be eliminated from account 314 and caboose-car days eliminated from the freight-car day divisor." The Subcommittee also proposed that there be a separation of repair costs for home cars, foreign cars, and railroad and privately-owned mileage

cars, as well as cabooses, and a separate showing of cost of classified repairs, running repairs, switching expenses, and credits for sales of scrap. The General Committee disapproved this recommendation because of the additional expense which would be required for such detailed accounting.

The recommendation of the Subcommittee deserves further consideration. However, it is not desirable to delay the decision of this case pending an effort to provide additional data bearing on car repairs. Accordingly, we conclude that car-repair costs should be determined in the manner specified in the 1949 report.

Taxes.—In 1952, the class I railroads showed a total investment of $32,698,240,806 in property, material, and supplies, upon which they paid property taxes (personal and real), and other taxes in lieu thereof, but excluding State income taxes, amounting to $319,221,322, a ratio of 0.976 per cent. That ratio is applied to ledger value of freight cars, undepreciated, and a freight-car repair proportion of ledger value, undepreciated, of shops, enginehouses, et cetera, producing $56,639,614. To this figure was added $23,354,062 as a proper estimated share of payroll taxes, which makes a total of $79,993,676 for taxes. This is translated into a figure of 14.334 cents per active car-day for taxes.

The defendants point out that in some States no ad valorem taxes are levied on freight cars, and makes certain other criticisms of the complainants' tax allocations. The

Susquehanna suggests that the figure of 14.334 cents "should be reduced by at least 50% pending a country-wide analysis leading to calculations based on accurate comprehensive figures." The reduction would amount to 7 cents per active car-day. The Boston & Maine is of opinion that in the light of its experience the property-tax figure of $56,639,614 should be reduced by 70 per cent, making it $16,991,884.

Considering the record as a whole, the complainants' allocation of this expense does not appear to be excessive.

Depreciation. This is the second predominating element of expense in the per diem charge. The wide difference of opinion among the parties as to what constitutes a proper basis for annual depreciation charges which properly should be included in the per diem rate continues to exist substantially as we noted in the 1949 report, at page 392. We there observed:

> There is a difference of opinion among carrier representatives as to whether annual depreciation, to be included in the per diem rate, should reflect a figure calculated to return to car owners the same number of dollars per car as originally were invested, or whether the amounts should be sufficient to enable a car owner at retirement to purchase a new car of like kind and size at the then current price level, which might be, and at the present time is, much higher than the price levels prevailing when many of the cars now in service were constructed.

That question was resolved together with the closely-related element of interest return, when we stated in the 1949 report as follows:

> Carriers who now buy cars must pay prices predicated on present values, and those who rent cars owned by others should expect to pay rentals based on such values.

Thus, both interest and depreciation, excepting a minor item of depreciation on fixed facilities, were calculated on the basis of reproduction cost for the purposes of determining a reasonable per diem charge in the 1949 proceeding.

Reviewing the matter for the purposes of this proceeding we note from the evidence now before us that the present day prices are still well above the levels of an era when many of the cars were purchased. Data of record show a range of freight-car prices from 1938 to 1952, from $2,569 to $5,859 for box cars and $2,278 to $5,814 for gondola and hopper cars.

A witness for the short-lines expressed the opinion that depreciation based on cost of reproduction was not in accord with governmental regulations or recognized accounting practice. That opinion is supported by some accountants and economists who believe that the purpose of depreciation accounting is not to provide a fund for the replacement of units of property being retired, but rather to recover the cost of those units in current use. In their exceptions to the proposed report, the complainants and the interveners which support them put much emphasis on

the views of a group of recent writers in the field of public utility regulation which "recognizes the unreality of original cost valuation and believes that something should be done about it." Some of these writers have suggested or advocated a basis sometimes called economic or value depreciation.

In *United Railways* v. *West*, 280 U.S. 234, cited in our 1949 report, the Supreme Court held that an allowance for annual depreciation should be based on present value and not on cost. That decision was overruled by the Court in *Federal Power Com.* v. *Hope Natural Gas Co.*, 320 U.S. 591, commonly referred to as the *Hope* case. Shortly after the earlier decision we had occasion to consider the question in *Telephone and Railroad Depreciation Charges*, 177 I.C.C. 351, 372-382. There the rail carriers urged "that the operating expense resulting from the retirement of a unit of property is not its original cost but rather the cost of replacing it in kind." Our comments, at pages 377 and 378, were as follows:

> When depreciation accounting is employed, a further and important objection to the cost of replacement or present value method is that retirement and replacement of the unit do not occur when the depreciation charge is made, and may not occur until many years in the future. If depreciation charges, therefore, are made each year on the basis of the current replacement cost or present value, they may prove to be quite out of line with this cost or value at the time when retirement

actually takes place. In view of the constant shift in such costs and values, this would indeed normally be the case, with the result that the depreciation reserve would be either too large or too small. No very satisfactory method of adjusting these irregularities has been suggested. It would also be necessary for us to exercise constant supervision over the depreciation charges, for the determination of current replacement cost or present value is so controversial a matter that it could not safely be left to the discretion of the carriers.

We realize that in determining depreciation the prevailing accounting practice is to use the ledger value, and we are not here concerned with the propriety of that practice. Our problem here is to determine the justness and reasonableness of the per diem rates in effect during the respective periods referred to and at present. In reaching such a determination we would be less than realistic if we failed to take into consideration, as pointed out in the 1949 report, that carriers who now buy cars must pay prices predicated on present values, and those who rent cars owned by others should expect to pay rentals based on such values. Failure to do so would cast an undue burden upon the car owners and favor unduly those who pay rentals.

In a special study such as is involved here we may consider the annual depreciation charges on freight cars for any given year, say 1952, which result from a normal application of the average prescribed rate to undepreciated

ledger value, and also bear in mind the replacement cost level. A ready device or tool for use in measuring the shortcomings of normal depreciation charges, from the standpoint of replacement, exists in our own reproduction cost new figure at the 1952 spot price level. These figures, which are of record, show an index relation of the reproduction cost new value of freight cars as of December 31, 1952, $9,587,048,000 (replacement in kind), to ledger value, $5,416,305,351 (original cost), of 177. We may apply this ratio to the normal depreciation charges to bring them up to that level, which would embrace replacement considerations, or we may simply apply the average depreciation rate to the reproduction cost new value with, of course, the same result. Applying the 1952 average depreciation rate of 3.12 per cent to the reproduction cost new total of $9,587,048,000 results in depreciation charges of $299,115,898.

For the foregoing reasons, we are persuaded that in determining depreciation to be considered in passing upon the compensatory character of per diem charges, the basis should be the undepreciated reproduction value.

Capital charges.—With respect to this element, also, the use of cost and reproduction is in controversy. In our 1949 report (page 393) we said:

> The short line complainants contend that any interest charge on the value of freight cars, repair shops, et cetera, should be based on depreciated ledger cost. Certain other carriers urge the use of depreciated reproduction cost new, termed present value, and in-

> clusion in the per diem rate of interest charges reflecting a rate of 6 per cent. * * * Inclusion in the per diem rate of an interest charge of 6 per cent on average present value of freight cars, freight repair shops, et cetera, does not appear to be excessive, in view of the fact that a portion of the resulting revenue must be paid out as income taxes.

In their brief, the complainants say:

> In connection with the $2.40 rate the General Committee's averaging method produced an interest on value item for freight cars of 43.588 cents, as against 31.516 cents on depreciated ledger value alone. If the General Committee had followed the Commission's decision [1949 report] and used depreciated reproduction value, the amount included in the per diem computation for interest on freight car value would have been 55.660 cents, and the current rate would be substantially in excess of $2.40.

The "averaging method" above mentioned produced an investment base which was the average of depreciated cost of reproduction and depreciated ledger value. To this base a 6-per cent rate of return was applied. The theory followed in determining this base is essentially the same as that of "fair value", which flourished about 25 years ago. In the *Hope* case and others the Supreme Court pointed out that there are various permissible ways in which any rate base on which the return is computed may be arrived at, and that the result reached rather than the method employed is controlling.

The choice of a percentage figure to be applied to the investment base is a point of much controversy. Although all of the defendants take substantially the same position as the Boston & Maine, which asserts that "it would be improper to include anything in the rent base beyond the costs of financing such property—in this instance the interest burden upon a car owner arising out of his acquisition and ownership of a freight car," the only ones making definite recommendations as to a rate of return are the New Haven, the Boston & Maine, and the Susquehanna. The first-named suggests 6 per cent based on ledger value, while the latter two carriers contend that the basis used should be about 4.6 per cent of that value. The latter figure is the result of an averaging process, reflecting, among other things, the average interest rate of 2.39 per cent on outstanding equipment-trust obligations. The complainants stress "risk of ownership" and "burden of replacement" incurred by the car-owning carriers, and hint at the danger to the national economy if railroads which have heretofore been willing to sink capital in freight cars should decide that in view of high replacement costs, prudence no longer permitted them to contribute their part to the national car fleet, but that they should become car renters rather than car owners.

An intervener, The Chesapeake and Ohio Railway Company, which owns a large number of cars and is consequently one of the principal per diem credit railroads, is more specific. It states:

> If the railroads in general, and the Chesapeake and Ohio in particular, are to own the number of cars required by the national economy, the per diem rate must provide adequate compensation after income taxes. If the per diem rate provided a realistic rate of return after income taxes, the railroads, including the Chesapeake and Ohio, would own a larger number of cars and could, in fact, justify increasing rather than reducing their car ownership.

This intervener, therefore, believes that, far from being reduced, the prevailing per diem rate of $2.40 per car per day is at least 97 cents too low and should be increased. The further expansion of the 97-cent figure which it suggests would be accomplished by adjustment of the car-day divisor to be discussed later.

Argument over investment base and percentage rate of return should not obscure the practical point involved, which is the number of dollars available by way of rental to a carrier which makes an investment in freight cars for joint use in nationwide transportation service. It seems clear that the car-owning carrier is entitled to a return larger than one based solely on cost of money measured by current interest rates, for in acquiring cars it acts somewhat as an entrepreneur. It must assume the burden of planning and financing the new equipment in the light of an uncertain demand for cars in general or those of a particular size and type due to unpredictable factors affecting the outlook for rail transportation. In other words, in determining a fair per diem charge some consideration

should be given to what are termed incentive and risk, and an appropriate place for such an element is in the capital charge.

In our 1949 report we stated that an interest charge of 6 per cent of present value of freight cars did not appear to be excessive. We adhere to that view on the instant record.

The car-day divisor.—For reasons which are well-known, it is generally agreed that surplus and unserviceable cars should be excluded in computing average costs per car-day. However, since per diem charges are established for future application, the extent of that exclusion necessarily rests upon an estimate as to the aggregate number of freight cars which the railroads will own in an indefinite future period, the number which will be unserviceable, and the number which will be idle because of insufficient traffic for their full utilization. The last element, which is closely related to fluctuations in the business cycle, is particularly speculative. In the past, average figures for various periods of years have been used in determining the car-day divisor, but other plans have also been considered. After discussing some of those plans at page 389 of our 1949 report, we said:

> The evidence is persuasive that an active-car divisor reflecting average age, now approximating 20 years, of freight cars in service, and covering representative periods of both heavy and light traffic, would produce more accurate results than a period of 5, 10, or 15 years.

It does not appear that theretofore the railroads had ever considered using a period as long as 20 years for this

purpose. In the studies upon which the charge of $1.50 approved in our 1949 decision was based, a 10-year period, 1936 to 1945, was used, and the ratio so arrived at was 86.15 per cent. The 20-year period suggested in the 1949 report covered 1927 to 1946, and produced a ratio of 80 per cent. In the studies which led to the $1.75 charge a period of 15 years, 1934 to 1948, was used to arrive at a ratio of 86.12 per cent. Originally, in the next studies relating to the $2 charge, a 15-year period, 1936 to 1950, was used, and the resulting ratio was 89.13 per cent. However, the General Committee considered it advisable to use the 20 years, 1931 to 1950, and thereby reduce the ratio to 82.75 per cent, incidentally increasing the estimated cost by about 15 cents a day. In the studies on which the present charge was based, a 20-year period, 1933 to 1952, was used, giving a ratio of 86.05 per cent.

In contrast to the foregoing ratios of 86.12, 82.75, and 86.05 are the following actual ratios for the years shown:

Year	*Per cent*
1949	90.39
1950	91.34
1951	94.27
1952	93.59

From 1933 to and including 1940, the average annual ownership of cars by class I railroads was 1,806,065. Because of depressed industrial activity, there were large numbers of surplus cars, and the percentage of unserviceability ranged from 8.8 to 15. The car-utilization ratio

consequently ranged from 63.98 per cent in 1933 to 84.16 per cent in 1940. From 1941 to 1952, inclusive, the class I railroads' annual ownership of cars averaged 1,738,696. Because of the greater average capacity of the cars, increased train speeds, and other means of greater efficiency, including a reduction in the percentage of unserviceability, which ranged from 2.7 to 6.9 per cent, those carriers were able to carry the heavy traffic of the war and post-war periods. Car surpluses after 1940 were negligible in comparison with those of the earlier period.[3] The car-utilization ratio, therefore, between 1941 and 1952 ranged from 90.39 to 96.67. In 1952, the latest year for which figures are of record, the ratio was 93.59. The average for the 5 years, 1948 to 1952, was 92.82, and the average for the 15-year period up to and including 1952 was 91.05 per cent. Taking note of the decline in railroad traffic in 1953 and 1954, the examiner in his proposed report suggested the use of a ratio of 90 per cent as representative of current conditions, subject to verification by actual figures for those years. The complainants in their exceptions do not question the accuracy of the 90-per cent ratio, although they contend that it would be more reasonable to apply a ratio of 86 per cent.

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[3] Complainants show that maximum freight-car surpluses in 1933 to 1940 ranged from 190,370 on March 14, 1940 to 691,587 on January 31, 1933. Minimum surpluses in the same period ranged from 64,299 on October 14, 1939 to 385,137 on October 31, 1933. In the period 1941 to 1952, maximum surpluses ranged from 23,416 on October 20, 1945 to 207,627 on November 5, 1949, and minimum surpluses from 673 on October 23, 1948 to 38,511 on October 4, 1941.

Upon consideration of the matter of the car-day divisor in the light of present evidence, we affirm the finding in the 1949 report that a 20-year period would produce more accurate results than a shorter period. The record does not afford a 20-year experience of car use prior to 1948; accordingly, a 15-year period will be used up to and including that year. We conclude that, for the purpose of determining the compensatory character of the respective per diem charges here under investigation, the reasonable car-day divisors to be used are 86.12 per cent for the 15-year period 1934 to 1948, 82.75 per cent for the 20-year period 1931 to 1950, and 86.05 per cent for the 20-year period 1933 to 1952.

Conclusions.—In accordance with the foregoing views, the figures submitted by the complainants have been adjusted or modified in the following respects: (1) The items representing freight-car repairs and the allocations based thereon are treated in the same manner as corresponding items were treated in the 1949 report, which eliminates certain costs incurred by car-users covering inspection of foreign cars not charged back to the car-owners; (2) depreciation for freight cars is based on undepreciated reproduction value; (3) depreciation for fixed facilities, such as shops, enginehouses, and power plants, a relatively minor item, is based on undepreciated ledger value; (4) return on investment in freight cars, shops, enginehouses, power plants, et cetera, is based on 6 per cent of depreciated reproduction value; and (5) the car-day divisor is based on car-utilization ratios for the respective periods as above noted. The figures as so modified are as follows:

ESTIMATED AVERAGE COSTS PER ACTIVE CAR-DAY

	1948	1950	1952
	Cents	*Cents*	*Cents*
Cost of freight-car repairs	73.131	80.591	92.591
Deadhead haulage of freight-car repair material	2.117	2.315	2.664
Charges to depreciation of freight cars	43.865	51.379	53.452
Charges account of maintenance and depreciation of shops	6.297	5.942	6.467
Miscellaneous maintenance of equipment accounts	4.901	5.962	6.986
Allocated proportion of general expense	3.339	3.891	4.691
Interest on freight-car value	41.946	50.292	55.508
Interest on value of repair shops	4.093	4.228	4.651
Interest on investment in stock of freight-car repair material	0.524	0.573	0.659
Interest on working capital	0.494	0.545	0.632
Cost of certain taxes	11.369	12.708	13.916
Totals	192.076	218.426	242.217

Additional labor, material, and payroll taxes to reflect increased cost levels as of May 1, 1949, and wages as of January 1, 1949	5.179		
Same as of April 1, 1951		13.134	
Same as of April 1, 1953			1.899
	197.255	231.56	244.116

Car ownership adjusted to car-utilization ratios:

86.12 per cent (1948)—558,428,160 car-days
82.75 per cent (1950)—531,677,250 car-days
86.05 per cent (1952)—559,599,360 car-days

No issue is presented as to the propriety of the charge of $1.75 before April 1, 1951, when the Susquehanna refused to continue the payment of that charge. The table above shows a cost of $2.31 as of that date, and therefore indicates that the charges of $1.75 from that date to April 30, 1952, was not in excess of reasonable compensation. The same conclusion as to the $2 charge in effect for the greater part of 1952 and 1953 is supported by the showing of an average cost of at least $2.42 in those years. The present charge of $2.40, in effect since July 31, 1953, is slightly lower than the cost of approximately $2.44 shown in the table as of April 1, 1953, and we conclude therefore that a charge of $2.40 under present conditions is reasonable compensation.

The Susquehanna in its requested findings suggests that there is a "zone of reasonableness" for per diem charges sufficiently wide to include the amounts for which it seeks approval as not "unjust or unreasonably low or noncompensatory for the periods of their effectiveness, and * * * within the zone of reasonableness." By Section 1(14)(a) we are authorized "to establish * * * the compensation to be paid" as car rental. This wording does not indicate that the authority may be exercised merely by defining the upper or lower limits of a zone of reasonableness, as is usually permitted in respect of transportation rates payable by shippers.

Consequently, our finding below specifies the per diem charges which, on the basis of the facts and circumstances before us, could properly be established under section 1 (14)(a). It necessarily follows that lower charges in our judgment would not be compensatory, either at present or in the past.

We find and declare that the per diem charges of $1.75, $2, and $2.40 were not in excess of reasonable compensation during the periods in which they were effective, and that the latter charge is not in excess of reasonable compensation for present use.

An order discontinuing this proceeding will be entered.

COMMISSIONER ALLDREDGE did not participate in the disposition of this proceeding.

APPENDIX

Intervenors in support of Complainants—The Chesapeake and Ohio Railway Company; Chicago, Rock Island and Pacific Railroad Company; The Delaware and Hudson Railroad Corporation; The Delaware, Lackawanna and Western Railroad Company; Erie Railroad Company; Louisville and Nashville Railroad Company; Minneapolis, St. Paul and Sault Ste. Marie Railroad Company; New York Central Railroad Company; The New York, Chicago and St. Louis Railroad Company; Northern Pacific Railway Company; The Pittsburgh & Shawmut Railroad Company; Southern Pacific Company; Union Pacific Railroad Company; Texas and New Orleans Railroad Company; Western Maryland Railway Company.

Intervenors in support of Defendants—The Ahnapee and Western Railway Company; Alexander Railroad Company; The Atlantic and Danville Railway Company; Bamberger Railroad Company; Bath and Hammondsport Railroad Company; Beaufort and Morehead Railroad Company (A. T. Leary, Lessee); Belfast and Moosehead Lake Railroad Company; Butte, Anaconda & Pacific Railway Company; Charles City Western Railway Company; Chattahoochee Valley Railway Company; Chesapeake Western Railway; Chicago, West Pullman & Southern Railroad Company; City of Prineville Railway; Craig Mountain Railway Company; Detroit and Mackinac Railway Company; Escanaba and Lake Superior Railroad Company; Flemingsburg and Northern Railroad Company; Fort Dodge, Des Moines &

Southern Railway Company; Genesee and Wyoming Railroad Company; Georgia, Ashburn, Sylvester & Camilla Railway Company; The Georgia Northern Railway Company; Hampton & Branchville Railroad Company; High Point, Thomasville & Denton Railroad Company; Howard Terminal Railway; Jerseyville and Eastern Railroad Company; Kentucky & Tennessee Railway; Lackawanna and Wyoming Valley Railroad Company (E. McLain Watters, Trustee); Lake Erie, Franklin & Clarion Railroad Company; Lakeland Railway; Live Oak, Perry & Gulf Railroad Company; Maryland and Pennsylvania Railroad Company; Minneapolis, Northfield and Southern Railway; Morehead and North Fork Railroad Company; The Narragansett Pier Railroad Company, Inc.; Nelson & Albemarle Railway Company; Norwood & St. Lawrence Railroad Company; Oregon & Northwestern Railroad Co.; Oregon Pacific and Eastern Railway Company; Paris and Mt. Pleasant Railroad Co.; Pearl River Valley Railroad Company; Rahway Valley Company (Rahway Valley Company, Lessee); Roscoe, Snyder and Pacific Railway Company; St. Marys Railroad Company; San Francisco and Napa Valley Railroad; The San Luis Central Railroad Company; Santa Maria Valley Railroad Company; Savannah & Atlanta Railway Company; The South Georgia Railway Company; Tennessee, Alabama & Georgia Railway Company; Trona Railway Company; Ventura County Railway Company; Virginia Blue Ridge Railway; Washington and Old Dominion Railroad; Washington, Idaho & Montana Railway Company.

IV. Proposed Report of the Trial Examiner

INTERSTATE COMMERCE COMMISSION

No. 31358

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, ET AL.

v.

NEW YORK, SUSQUEHANNA & WESTERN RAILROAD COMPANY (H. K. NORTON, TRUSTEE) ET AL.

Submitted Decided

Per diem charges of $1.75 and $2 for the use of railroad-owned freight cars when on the lines of rail carriers other than their owners in effect prior to August 1, 1953, found reasonable and a charge of $2.10 found reasonable for present use. Declaratory order entered.

S. R. Brittingham, Jr., R. R. Bongartz, Carson L. Taylor, J. P. Fishwick, F. E. Baukhages, C. C. Howell, E. H. Burgess, D. O. Mathews, Eldon Martin, Edwin C. Matthias, D. S. Wright, B. J. Viviano, Thomas T. Railey, H. Merle Mulloy, J. L. Homire, Seddon G. Boxley, J. T. Suggs, W. C. Plunkett, J. H. Miller, J. L. Rice, R. S. Outlaw, J. H. Wright,

E. J. Zoll, Jr., J. Carter Fort, Jr., Alfred W. Hesse, Jr., Martin A. Meyer, Jr., and *George W. Holmes* for complainánts.

Carl Newton, Granville Whittlesey, W. J. Hickey, J. W. Grady, H. D. Boynton, Richard Jackson, Lawrence Chaffee, William A. Colton, Richard Swan Buell, and *Joseph P. Hawryluk* for defendants.

Hewitt Biaett, J. C. Kauffman, Ross L. Thorfinnson, W. H. Parsons, Prime F. Osborn, III, Thormund A. Miller, M. C. Smith, Jr., Robert D. Brooks, John Colgren, Kemper A. Dobbins, Warren H. Ploeger, W. H. Fitzpatrick, John F. Reilly, Paul F. Robinson, and *Martin L. Cassell* for interveners in support of complainants.

W. J. Hickey, Matthew Crawford, and *Milton Ferguson* for interveners in support of defendants.

REPORT PROPOSED BY HOWARD HOSMER, EXAMINER

The complaint herein was filed September 21, 1953, by 19 of the larger class-1 railroads listed in the footnote.[1] The defendants include among others 5 class-1 railroads: Boston and Maine Railroad; The Long Island Railroad Company (William Wyer, Trustee), (the Long Island); The New York, New Haven and Hartford Railroad Company (the New Haven); New York, Susquehanna & Western Railroad Company (the Susquehanna); and the Rutland Railway Corporation. Six short-line railroads are also defendants: Atlantic & East Carolina Railway Company; East Tennessee and Western North Carolina Railroad Company; St. Johnsbury & LaMoille County Railroad; The New Jersey and New York Railroad Company (Horace Banta, Trustee); and Mississippi & Skuna Valley Railroad Company. The last-named defendant is a class-III railroad; the preceding 5 are class-II lines.

[1] The Atchison, Topeka and Santa Fe Railway Company; Atlantic Coast Line Railroad Company; The Baltimore and Ohio Railroad Company; Chicago & Eastern Illinois Railroad; Chicago, Burlington & Quincy Railroad Company; Chicago, Milwaukee, St. Paul & Pacific Railroad Company; Great Northern Railway Company; Gulf, Mobile & Ohio Railroad Company; Illinois Central Railroad Company; Lehigh Valley Railroad Company; Missouri Pacific Railroad Company (Guy A. Thompson, Trustee); Norfolk and Western Railway Company; The Pennsylvania Railroad Company; Reading Company; The St. Louis-San Francisco Railway Company; Southern Railway Company; The Texas and Pacific Railway Company; The Virginian Railway Company; Wabash Railroad Company.

There are 14 interveners in behalf of the complainants, all of them being class-I railroads. The interveners in behalf of defendants, 57 in number, are railroad carriers principally in classes II and III. All the interveners are listed in the appendix.

The complaint grows out of a disagreement between the complainants and the defendants concerning the reasonableness of per diem charges for the use of railroad-owned freight cars payable by nonowning railroads. In *Alabama, T. & N. R. Co.* v. *Aberdeen & R. R. Co.*, 274 I.C.C. 383, decided July 11, 1949, (hereinafter referred to as the 1949 report), the Commission found that the per diem charge of $1.50 per day then in effect was not shown to be either unreasonably high or unreasonably low. Effective November 1, 1949, that charge was increased to $1.75 by action of members of the Association of American Railroads (hereinafter called the AAR) under procedure described in the 1949 report.

The procedure for establishing per diem charges was considered by division 2 of the Commission in *Association of American Railroads—Agreement*, 277 I.C.C. 413, and approved as conforming to section 5a of the Interstate Commerce Act. The report included the following paragraph:

> Articles XI and XII accord to each subscriber certain individual rights. The former states that the agreement shall not be construed to prevent or limit recourse to this Commission by any subscriber for any

relief (in pending proceedings, or otherwise) accorded by law in respect of any of the matters covered thereby. The latter (article XII) provides that all subscribers shall have the free and unrestrained right to take independent action either before or after any determination arrived at through the procedure provided for in the agreement.

This agreement became effective October 7, 1950. Under the procedure which it set up the per diem charge was increased to $2, effective May 1, 1952, and to $2.40, effective August 1, 1953.

The Susquehanna, which was not a party to the agreement, notified the complainants in March 1951 that after April 1, of that year it would refuse to pay the charge of $1.75 but would settle on a graduated scale ranging from $1.20 to $2, depending on the age of the car. In 1953 it offered to increase that scale to a range between $1.33 and $2.21. The complainants refused those offers, and the car rentals payable by the Susquehanna are now involved in a number of pending lawsuits.

In June 1953 the Boston & Maine, the New Haven, and the Rutland gave notice of their refusal to pay the charge of $2.40 as well as to pay the former $2 charge after July 31, 1954. Later the Boston & Maine offered to pay on a graduated basis or a flat rate of $1.72 per day. The Long Island in August 1953 advised that it was willing to continue paying a $2 charge but would not accept the $2.40

charge. The Atlantic & East Carolina, St. Johnsbury & Lamoille County, New Jersey & New York, and the Barre & Chelsea have followed a similar course. The situation with respect to present payments by defendants other than those here named is not disclosed.

It is alleged in the complaint that, to the extent that the defendants have paid and are paying or offering to pay charges less than those generally in effect as above indicated, "such payments have been, are and would be unjust, unreasonable and noncompensatory, in violation of paragraphs (4), (10) and (11) of section 1 of the Act; and such action by defendants has been, is and would be disruptive of the 'uniform national basis' of handling per diem, which has been deemed necessary by the Commission in order to facilitate 'the performance of orderly transportation service by railroad in the public interest.' *Association of American Railroads—Agreement, supra,* 423." The prayer of the complaint is that—

> the Commission find and declare that the per diem rates of $1.75 and $2, during the period in which these rates were effective, were just, reasonable, and otherwise lawful, that the current per diem rate of $2.40, effective August 1, 1953, is just, reasonable and otherwise lawful, and that the performance of orderly transportation service by railroad in the public interest requires uniform observance of such rates by defendants together with other carriers; and that the Commission grant such other and further relief as may be required in the premises.

The complainants expressly disclaim any intention to invoke the only specific power with respect to per diem which the Commission has, namely by section 1 (14)(a) to establish "the compensation to be paid and other terms of any contract, agreement, or arrangement for the use of any locomotive, car, or other vehicle not owned by the carrier using it (and whether or not owned by another carrier)". Such action would involve the entry of an order, which presumably would continue in effect for the indefinite future and, unless it were vacated or modified, would render the present procedure for dealing with per diem charges inoperative.

In a joint answer to the complaint filed by the Boston & Maine, the New Haven, and certain short-line defendants these parties ask "that the Commission find and determine and fix by order the rate or rates for the use of freight cars to be paid by complainants to defendants and by defendants to complainants." The short-line defendants and interveners request in their briefs that the Commission determine and definitely fix the amount of compensation to be paid by a rail carrier when it uses the freight cars of another, but the briefs of the other defendants are less positive. The New Haven and the Boston & Maine ask for a declaration that the present per diem rate is unlawful and as a maximum should not be more than $1.04 per day if it is to be fixed as a single amount. Alternatively they prefer a graduated scale. The Susquehanna asks principally that the graduated scale which it favors be found not unreasonably low or noncompensatory. The Long Island

and the New Jersey & New York urge that the complaint should be dismissed and assert that the Commission is not empowered to prescribe charges for car hire retroactively. As was suggested at the prehearing conference, it appears that the majority of the parties, except the short lines, prefer that the Commission take action in the nature of a declaratory order, which under section 5(d) of the Administrative Procedure Act it may issue "to terminate a controversy or remove uncertainty." Manifestly there is a controversy here and uncertainty as to the measure of just compensation due complainants from the defendants for the use of cars owned by the former.

With the exception of its action in *Increased Per Diem Charge on Freight Cars*, 268 I.C.C. 659, which was set aside upon judicial review, *Palmer* v. *United States*, 75 F. Supp. 63, the Commission has never undertaken to establish a general basis of per diem charges under its authority in section 1 (14)(a). The present system of rentals in its broad form has been worked out by the railroads themselves. The per diem plan was adopted in 1902 after a mileage system was found to be unsatisfactory for reasons mentioned in *Rules for Car-Hire Settlement*, 160 I.C.C. 369, 375. The charge has been uniform for all types of cars, and up to the time of the present controversy it has applied uniformly to all railroads, subject to the operation of reclaims. In its 1949 report (p. 386) the Commission said:

> For many years the per diem rate has been based on average costs. The daily rental for a car valued at $2,000, for example, is the same as that for a car worth

twice as much. There is no request herein for different per diem rates on freight cars of different ages, sizes, or classes. A carrier which has a foreign railroad car on its rails immediately after midnight pays the rental for that calendar day in the absence of some special agreement. If it receives a car in interchange after midnight and delivers it in interchange before the following midnight, it does not pay any car rental.

Some of the defendants here question the principle of uniformity and introduced evidence in support of their views. These will be discussed before the main issues in the case are considered.

Both the Long Island and the New Jersey & New York, whose lines are partly in the metropolitan area of New York City, perform comparatively short line-hauls in their freight service. The average detention per car in their terminals is high. These defendants believe that the basis of per diem charges should take into account a distinction between items of car-ownership cost attributable to movement use (mileage) and those related to the passage of time. They therefore suggest a basis under which "each using road would pay time costs in proportion to the time that it holds the car and mileage costs in proportion to its own mileage use of the car."

Unless the Commission dismisses the complaint, the Long Island and the New Jersey & New York urge that it—

> (a) undertake to determine true freight car ownership costs * * * (b) make an accurate separation of

> such costs between time and mileage; (c) determine separate average unit costs for time and mileage; and (d) fix separate car hire charges for each user road reflecting the average time and mileage costs for which such road is responsible.

Admittedly such a determination could not be made from the evidence in this case. Apparently it would involve a gigantic statistical undertaking. If by that means a scheme of equitable separate charges for individual user roads could be devised, there would be an increase in the labor now required for settling per diem accounts.

The New Haven and the Boston & Maine suggest a plan of per diem charges under which there would be a variation of rates with respect to owner railroads based on the average age of their cars. The Susquehanna also supports this suggestion. According to the sponsors, this plan "by giving higher rent for new than for old cars would furnish an incentive to car owners to renew the fleet and to get rid of old equipment." The steps necessary to carry out the plan are stated as follows:

> Mr. Glacy's program assumed that in each year the AAR would ascertain for each owning railroad the inventory of its cars; ascertain for each group of cars of each railroad the proper charge per day; and derive for each railroad a composite figure which was the weighted average rate per day for its entire fleet. The AAR would then publish a booklet showing each own-

ing railroad's composite rate, which would be the basis.

This plan, too, would necessitate a complicated statistical operation to ascertain the proper composite figure, and it may well be doubted whether the clerical labor required in computing per diem credits would be as simple as the sponsors believe.

As above indicated, the suggested plans for varying per diem charges could not be put into effect without an extensive investigation either by the Commission or by the AAR. The facts and arguments here presented are not deemed persuasive that plans of this kind are desirable. If the Commission should have a different view, however, there would still be a considerable interim in the future in which a single uniform charge would necessarily have to be applied. Furthermore the issue of reasonableness of the present charge and its immediate predecessors raised in this proceeding must be decided.

There is general agreement that car rentals, whether established by the Commission or otherwise, should be reasonably compensatory and no more, *Palmer* v. *United States*, *supra*, 69. The determination is essentially a problem in cost accounting. The earliest attempt to deal exhaustively with the problem was made 45 years ago by the socalled McCrea commission, composed of 5 railroad presidents. They adopted the principle that the per diem charge should cover (1) repairs, (2) taxes, (3) depreciation, (4) interest on investment, and (5) miscellaneous ex-

pense incidental to ownership. This principle has been generally accepted as valid ever since, but there has been continuing controversy as to how the principle shall be applied. Indeed the members of the McCrea Commission themselves reached three different conclusions on that point.

The principle just referred to serves as a guide for the General Committee of the AAR, which is charged with studying proposals for changes in per diem rates, aided by a subordinate special committee, known as the Subcommittee on Mileage and Per Diem. Costs are allocated to the various categories from expense figures reported to the committees in response to questionnaires sent to car-owning railroads. The General Committee alone decides what proposed changes in the per diem rate shall be recommended to the Board of Directors of the AAR for submission to subscribers to the per diem agreement.

In its 1949 report the Commission discussed the allocations of costs for 1946 presented in support of the per diem charge of $1.50 there in issue. It criticized some of the allocations as too large, but in respect of other important items it made comments which could be interpreted as finding that those items were understated. In an appendix there were shown "averages of such costs as reallocated in the accompanying report" apparently indicating a view that the average cost per active freight car per day was $1.92 in 1947.

It is understandable, therefore, that the complainants lean heavily on the 1949 report, on which they comment in their brief as follows:

> * * * the Commission resolved in favor of the present complainants almost every issue now in dispute, and indicated approval of, if it did not formally prescribe, a formula for the ascertainment of per diem rates which, when applied in this case, establishes the validity of the rates that defendants are here assailing.

If the 1949 report is to be construed as prescribing a formula, the complainants should prevail in the instant case, for that report contains a number of statements highly favorable to their contentions. In the 1949 report, however, the Commission dismissed the complaint in No. 29587, brought by the short lines, which asked the Commission among other things "to promulgate a formula to be employed in the future in determining the lawful compensation to be paid for the use of railroad-owned freight cars." Also it dismissed the complaint in No. 29751, in which six large western lines took the position that the per diem charge of $1.50 was "inadequate, unjust, and noncompensatory." Therefore the soundest interpretation of the 1949 report seems to be that the statements therein were intended to have no significance except as reasons for approving the charge of $1.50 per day.

In this case the complainants seek findings which would approve all per diem charges established after the 1949 report. In each instance the General Committee studied

statistics reported by class 1 railroads in response to questionnaires. Those upon which the charge of $1.75 was based were for 1948, but there was an adjustment to reflect wage rates, material prices, and payroll taxes and other determinable increases up to September 1, 1949. The statistics pertaining to the $2 charge were those for 1950, projected to include cost levels as of April 1951. Full recognition was thus given to the 40-hour week, which was in effect throughout 1950. The present charge of $2.40 was based on figures for 1952. The information for the latter year was received from 121 railroads, having approximately all the freight-car ownership of class 1 railroads. Concerning the latest study, the complainants' principal witness testified that it "came closer to applying the Commission formula [1949 report] than any of its previous studies leading to a per diem adjustment."

Freight car repairs—This is the largest single category of expense included in the per diem charge and amounts to about 40 per cent of the total. Also it is used as a basis of allocating certain other costs.

The basic figures for this item are derived from account 314, Freight Train Cars—Repairs, in the accounting classification. The reported total for 1952 was $586,914,603. To this the General Committee added $24,965,504 for switching home freight cars marked for repairs, and deducted $65,887,034 for costs of car users' repairs to foreign cars damaged by them through improper handling, compensation for foreign cars destroyed on car users' lines,

certain switching costs, and a portion of labor costs of inspection and other service at terminal and junction points. The reasons for these adjustments were stated on pp. 390-1 of the 1949 report. The complainants thus estimate the cost of repairs at 97.836 cents per active car day.

In the 1949 report the Commission found that there should have been a further deduction of the costs incurred by car users for inspection of foreign cars not charged back to car owners. The complainants have not seen fit to consider this deduction as part of what they regard as the Commission's formula, approved or prescribed in the 1949 report. They argue:

> It is technically true that the expense is not one which the owner bears immediately and directly but it is one which the owner bears vicariously and by substitution; and nonowners should not be shielded from the impact of this ownership burden.

Applied to the 1952 study the deduction would amount to only about 5 cents per day, a relatively small figure. Nevertheless Commission's reasons for excluding the item seem sound.

The defendants contend that there should be even larger deductions for the expense of car inspection now included in account 314. Some of the defendants would eliminate all inspection costs on the ground, as stated by one of them, that "inspection is obviously primarily for purposes of operation and safety, and with the primary objective of

preventing breakdowns in transportation on the inspecting line, which is the line which is using the cars." Such a sweeping generalization can not be sustained. The instructions published in connection with the accounting classification direct that "the cost of repairs * * * shall include the cost of inspecting to determine the repairs necessary and * * * the cost of inspecting and testing after repairs have been made * * * to determine whether the repairs have been properly made." The cost witness for the short-line parties in effect conceded that inspection costs of this kind may properly be considered maintenance. If there is to be any segregation of inspection costs as between maintenance and transportation, it should follow an authoritative study.

In the 1949 report the Commission said (p. 391):

> Numerous repairs are applied to freight cars when on the lines of railroads other than their owners, and, except for the relatively few due to defects for which the using line is responsible by reason of improper handling, commonly called no-bill repairs, definite sums published in connection with the freight-car interchange rules may be billed against and collected from the owning railroads. Such amounts are revised from time to time, to correspond with changes in labor and material costs, but as the published revisions lag behind changes in price levels, the actual costs, in a period of rising prices, of supplying materials and applying repairs to foreign cars may, and frequently do, exceed the amounts that may be recovered.

Some of the defendants contend here that losses which they and other carriers incur because of their inability to recoup full costs of these repairs both on foreign per diem cars as well as mileage cars should be deducted from the total car repair costs. It is testified for the Boston & Maine that this deficiency is equivalent to nearly 30 per cent of its charges to account 314, and applying this percentage to aggregate car repair costs of $586,914,603 used in the complainant's study, it suggests the elimination of $175,006,186 from that aggregate. It would be very hazardous to make any such adjustment in the absence of fairly complete information bearing on the matter. Other defendants more cautiously suggest only that the situation should be investigated. This attitude seems to be reflected in the recommendation of the Susquehanna that "there should be segregated and eliminated from ownership cost figures all amounts spent by users for the maintenance of cars which are not recoverable by the user from the owner."

The various defendants introduced four cost str in which the aggregate car-repair figures there shown differ widely. That of the short-line parties shows a total of $498,922,522. The figure in the New Haven study is $457,610,831. Much lower are those of the Boston & Maine, $259,486,694, and of the Susquehanna, $217,158,403. Each of the witnesses who presented these studies is a man of long experience in this field. The wide variations in these figures apparently reflect individual differences in respect of reliance upon conjectural factual data.

Some conjecture of this kind is inescapable because of the comprehensive nature of account 314. It is the largest of the primary operating expense accounts, embracing nearly 10 per cent of total freight expense. It includes "the net loss sustained on account of the destruction of foreign cars" and "amounts paid to others for repairs of freight cars for which the carrier is liable." Among the freight cars covered by the account are cabooses and refrigerator cars. As of November 1, 1953, however, 96.5 per cent of the cars owned by class 1 carriers consisted of box, gondola, hopper, stock, and flat cars, subject to per diem.

The Subcommittee on Mileage and Per Diem in 1951 came to the conclusion that a proper per diem charge could be more readily determined if account 314 could be subdivided and recommended that all the railroads do so beginning with 1952. The Subcommittee found that there was "considerable variation in the practices of various railroads in the charging of inspection costs as between account 314 and account 402." It was of the view that "it would be better if car repairs for cabooses could be eliminated from account 314 and caboose car days eliminated from the freight-car day divisor." The Subcommittee also proposed that there be a separation of repair costs for home cars, foreign cars, and railroad and privately-owned mileage cars, as well as cabooses and a separate showing of cost of classified repairs, running repairs, switching expenses, and credits for sales of scrap. The General Committee disapproved this recommendation because of the additional

expense which would be required for such detailed accounting.

There appears to be good reason for the Commission and the railroads to give careful consideration to the recommendation of the Subcommittee in the interest of removing some of the controversy surrounding this subject. Account 314, as before indicated, includes items of expense which are not related to per diem cars, such as the repairs to cabooses and railroad-owned cars rented on a mileage basis. These expenses should be segregated by special studies currently maintained. However, it is not desirable to delay the decision of this case pending an effort to provide addition data bearing on car repairs. Accordingly, it is concluded that car-repair costs should be determined in the manner specified in the 1949 report.

Taxes—In 1952 the class 1 railroads showed a total investment of $32,698,240,806 in property, material, and supplies, upon which they paid property taxes (personal and real) and other taxes in lieu thereof but excluding State income taxes amounting to $319,221,322, a ratio of 0.976 per cent. That ratio is applied to ledger value of freight cars, undepreciated, and a freight-car repair proportion of ledger value, undepreciated, of shops, enginehouses, etc., producing $56,639,614. To this figure was added $23,354,062 as a proper estimated share of payroll taxes, which makes a total of $79,993,676 for taxes. This is translated into a figure of 14.334 cents per active car day for taxes.

The defendants point out that in some important States no ad valorem taxes are levied on freight cars and make certain other criticisms of the complainants' tax allocations. The Susquehanna suggests that the figure of 14.334 cents "should be reduced by at least 50% pending a country-wide analysis leading to calculations based on accurate comprehensive figures." The Boston & Maine is of opinion that in the light of its experience the property-tax figure of $56,639,614 should be reduced by 70%, making it $16,991,884. The reduction would amount to 7 cents per active car-day.

In the absence of more exact figures the complainants' allocation of this expense appears not to be excessive.

Depreciation—On this subject the complainants say in their brief:

> In the 1948 and 1950 studies, leading to the $1.75 and $2.00 per diem rates, the General Committee used the carriers' aggregate recorded depreciation as the depreciation element of freight car ownership cost. The depreciation item thus reflected freight car value based on original cost. Prior per diem rates had been similarly calculated.
>
> In [the 1949 report] the Commission discussed the contentions of the parties concerning original cost versus replacement value in connection with depreciation and interest return, and its conclusions are reflected in the observation that:

> Carriers who now buy cars must pay prices predicated on present values, and those who rent cars owned by others should expect to pay rentals based on such values.
>
> In conformity with the foregoing statement the Commission computed both depreciation and interest on the basis of replacement value in the formula appended to its report in the prior case.
>
> * * * the General Committee adopted the principle laid down by the Commission, and calculated the annual depreciation charge on the basis of reproduction value. The difference between using original cost and using reproduction value as the depreciation base * * * is the difference between a cost per day of 30.281 cents and 53.598 cents.

The foregoing constitutes the sole justification offered by the complainants for depreciation based on cost of reproduction. They do not undertake to support their position by citation of court decisions or modern accounting practice.

The short-line parties presented as a witness an experienced certified public accountant, who expressed the opinion that depreciation based on cost of reproduction was not in accord with governmental regulations or recognized accounting practice. That view is supported by the general agreement of economists that the purpose of depreciation accounting is not to provide a fund for the replacement of

units of property being retired but to recover the cost of those units in current use.[2]

The holding of the Supreme Court based on a contrary view in *United Railways* v. *West*, 280 U. S. 234, cited in the 1949 report, was expressly overruled in *Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U. S. 591, commonly known as the *Hope* case. The 1949 report is unique among Commission decisions in suggesting the desirability of using reproduction cost as a basis for depreciation. The question was considered exhaustively 18 years before in *Telephone and Railroad Depreciation Charges*, 177 I.C.C. 351, 372-382, shortly after the decision in *United Railways* v. *West, supra.* There the rail carriers urged "that the operating expense resulting from the retirement of a unit of property is not its original cost but rather the cost of replacing it in kind." The Commission rejected that view, and its comments at pp. 377-8 are pertinent here:

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[2] See Barnes-The Economics of Public Utility Regulation, p. 259; Troxel-Economics of Public Utilities, p. 337; Thompson & Smith-Public Utility Economics, p. 330.

The New York Public Service Commission very recently rejected a suggested method "to protect equity investors in utilities against the rigors of inflation, the use of depreciation calculated not upon the basis of cost or investment but in dollars adjusted to the same purchasing power of the dollar originally committed to the enterprise." *Re New York Telephone Co.*, 5 PUR 3rd 33, 46.

See also Hills—The law of Accounting, 54 Col. L. Rev. 1, 20 (January 1954). The second installment of this paper contains the most recent discussion of the point, id. 1049, 1077-8. (November 1954).

> When depreciation accounting is employed, a further and important objection to the cost of replacement or present value method is that retirement and replacement of the unit do not occur when the depreciation charge is made, and may not occur until many years in the future. If depreciation charges, therefore, are made each year on the basis of the current replacement cost or present value, they may prove to be quite out of line with this cost or value at the time when retirement actually takes place. In view of the constant shift in such costs and values this would indeed, normally be the case, with the result that the depreciation reserve would be either too large or too small. No very satisfactory method of adjusting these irregularities has been suggested. It would also be necessary for us to exercise constant supervision over the depreciation charges, for the determination of current replacement cost or present value is so controversial a matter that it could not safely be left to the discretion of the carriers.

The last sentence above quoted is an example of general recognition of the fact that cost of reproduction can only be estimated, and the process is inherently difficult, involving many assumptions which are at least open to question. This is true even though the estimates are based as they are here on data obtained from the Commission's valuation records.

In determining depreciation to be considered in arriving at a proper per diem rate the basis should be ledger value in accordance with the generally accepted accounting theory.

Capital Charges—In connection with this element also the use of cost-of-reproduction is a point of controversy. On this subject the Commission in its 1949 report said: (a. 393)

> An appropriate interest rate, if applied to depreciated ledger cost of freight cars, would not adequately compensate car owners, because such value, averaging $1,092 for freight cars in the service of class 1 railroads at the end of 1946, was 42.3 per cent below their estimated value, averaging $1,891, at that period. Carriers who now buy cars must pay prices predicated on present values, and those who rent cars owned by others should expect to pay rentals based on such values. Inclusion in the per diem rate of an interest charge of 6 per cent on average present value of freight cars, freight repair shops, et cetera, does not appear to be excessive, in view of the fact that a portion of the resulting revenue must be paid out as income taxes.

The complainants are probably justified in asserting that the Commission "held that interest should be computed at 6 per cent on reproduction value," but they do not consider this to be a mandatory requirement. In their brief they say:

> **In connection with the $2.40 rate the General Committee's averaging method produced an interest on value item for freight cars of 43.588 cents, as against 31.516 cents on depreciated ledger value alone. If the General Committee had followed the Commission's decision and used depreciated reproduction value, the amount included in the per diem computation for interest on freight car value would have been 55.660 cents, and the current rate would be substantially in excess of $2.40.**

The "averaging method" above mentioned produced an investment base which was the average of depreciated cost of reproduction and depreciated ledger value. To this a 6-per cent rate of return was applied. The theory followed in determining this base is essentially the same as that of "fair value" which flourished about 25 years ago but has lost most of its significance since the *Hope* case.[3]

It is true, as complainants say, that the Commission's right to recognize reproduction value is not to be questioned, but the 1949 report in its extreme reliance on present value may properly be characterized as anomalous. Long before the *Hope* case, the Commission in 1927 carefully pointed out the weaknesses of the cost-of-reproduction basis in *Excess Income of St. Louis & O'Fallon Ry. Co.*, 124 I.C.C. 3, 28-37. Later in *Petroleum Rail Shippers' Assn. v. Alton & S.R.*, 243 I.C.C. 589, 663, the Commission de-

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[3] See "The *Hope* Case and Public Utility Valuation in the States (Rose), 54 Col. L. Rev. 188 (May 1954).

termined the value of two pipeline carriers on the basis of original cost less depreciation instead of the lower cost of reproduction. In the general rate-increase cases since 1946 the Commission has adhered to original cost as the principal element in the rate base, *Increased Freight Rates,* 1947, 270 I.C.C. 403, 436; *Increased Freight,* 1951, 284 I.C.C. 589, 607. Even more pertinent here is the decision in *New York, S. & W. R. Co. Abandonment,* 275 I.C.C. 10, in which there was an issue of just compensation to the Susquehanna for transportation service which it performed for the New York Central. At p. 16 of that report the Commission said:

> The Susquehanna maintains that reproduction cost at present-day prices, less depreciation, provides a more fair and equitable basis for determining a fair return on value than original cost less accrued depreciation. The Central insists that the latter factors should be used * * * We likewise consider original cost less depreciation as the most suitable base for the purpose of this case. In any future revisions of the cost study, such base could be quickly and inexpensively determined.

The last sentence above quoted recognizes the fact already pointed out that cost of reproduction is an unstable and indefinite base not readily ascertainable. This objection is sufficiently forceful in itself to justify the sole use of depreciated ledger value as an investment base for present purposes without considering other criticisms of the cost-of-reproduction basis which have caused it to be discredited in the past 10 years.

The choice of a percentage figure to be applied to the investment base must rest necessarily on judgment in a field which has been a battleground of controversy for about half a century. Although all the defendants take much the same position as the Boston & Maine, which asserts that "it would be improper to include anything in the rent base beyond the costs of financing such property—in this instance the interest burden upon a car owner arising out of his acquisition and ownership of a freight car," the only ones making definite recommendations as to a rate of return are the New Haven, the Boston & Maine, and the Susquehanna. The first-named suggests 6 per cent based on ledger value, but the other two say it should be about 4.6 per cent of that value. The latter figure is the result of an averaging process, reflecting among other things the average interest rate of 2.39 per cent on outstanding equipment-trust obligations.

In urging that "the General Committee's formula conservatively understates the legally allowable charge for depreciation and interest return as elements of ownership cost", the complainants stress "risk of ownership" and "burden of replacement" incurred by the car-owning carriers and hint at danger to the national economy "if railroads which have heretofore been willing to sink capital in freight cars should decide that in view of high replacement costs prudence no longer permitted them to contribute their part to the national car fleet, but that they should become car renters rather than car owners."

An intervener, the Chesapeake and Ohio Railway Company, which owns a large number of cars and is consequently one of the principal per diem credit railroads is more specific. It states:

> If the railroads in general, and the Chesapeake and Ohio in particular, are to own the number of cars required by the national economy, the per diem rate must provide adequate compensation after income taxes. If the per diem rate provided a realistic rate of return after income taxes, the railroads, including the Chesapeake and Ohio, would own a larger number of cars and could, in fact, justify increasing rather than reducing their car ownership.

This intervener therefore believes that, far from being reduced, "the prevailing per diem rate of $2.40 per car per day is at least 97 cents too low and should be increased." The further expansion of the 97-cent figure which it suggests would be accomplished by adjustment of the car-day divisor to be discussed later.

Argument over investment base and percentage rate of return should not obscure the practical point involved, which is the number of dollars available by way of rental to a carrier which makes an investment in freight cars for joint use in nationwide transportation service. It seems clear that the car-owning carrier is entitled to a return larger than one based solely on cost of money measured by current interest rates, for in acquiring cars it acts somewhat as an entrepreneur. It must assume the burden of planning and financing the new equipment in the light of

an uncertain demand for cars in general or those of a particular size and type due to unpredictable factors affecting the outlook for rail transportation. In other words, it is not disputed that the per diem charge should take some account of what are termed incentive and risk, but the problem of proper allowance for this consideration is difficult. The appropriate place for such an element, it is believed, is in the rate of return without dividing it between that item and the depreciation charge. Also it seems that the defendants are right that the incentive to build new cars will have more force if rate of return is based on original cost.

Another complication has to do with the impact of income taxes. At a time when such taxes were comparatively trivial, the Supreme Court held that the fairness of a return to a utility should be determined on the basis of what it had left after paying income taxes. The validity of this principle is subject to doubt in the present era of high income taxes,[4] but the Commission gave some weight to income tax liability in the 1949 report.

The six-per cent return on depreciated reproduction value, strongly suggested as proper in that report, was equivalent to a return of approximately 10.6 per cent on depreciated original cost. This return, as the Commission pointed out, would be reduced by income taxes. In the instant case it is concluded that a return of 10 per cent

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[4] In Justice Douglas's dissenting opinion in *Vinson* v. *Washington Gas Co.*, 321 U. S. 489, he said: "It is self-evident that the ability to pass present wartime income taxes on to others is a remarkable privilege indeed."

on original cost of freight cars less depreciation would be fair. This would produce a greater amount of money than the allocation for interest in the complainants' studies, but the excess would be much less than the reduction in the allocation for depreciation recommended in this report. Thus the total amount allocated for depreciation on freight cars and interest on the value thereof in complainants' 1952 study is $542,366,675. The corresponding allocation upon the basis here proposed is $462,120,718. On the basis suggested in the 1949 report the allocation for these items would be $609,736,258.

In this report the return on investment in shops, engine-houses, power plants, etc., is based on 6 per cent of depreciated ledger value. This item is relatively unimportant.

The Car-Day Divisor—For reasons which are well-known it is generally agreed that surplus and unserviceable cars should be excluded in computing average costs per car day. However, since per diem charges are established for future application, the extent of that exclusion necessarily rests upon an informed guess as to the aggregate number of freight cars which the railroads will own in an indefinite future period, the number which will be unserviceable, and the number which will be idle because of insufficient traffic for their full utilization. The last element, which is closely related to fluctuations in the business cycle, is particularly speculative. Hence the basis of estimating the percentage of active car-days has always been a subject of wide disagreement. The Commission devoted three pages of its 1949 report to this question, and following paragraph on p. 389 indicates its conclusions:

> The per diem rate could be revised upward and downward periodically to conform to annual fluctuations in the number of active cars, and if based on the approximate costs of ownership and maintenance and active cars for a designated recent year it could not be said to be unreasonable. Or the rate could be determined by the use of an active-car ratio based, from time to time, on the average number of active cars in use over a representative period of years, and, if predicated on the approximate costs of ownership and maintenance for a designated recent year, the rate so fixed could not be said to be unreasonable. Stated differently, there is a rather wide zone of reasonableness within which the carriers may establish a lawful per diem rate. The evidence is persuasive that an active-car divisor reflecting average age, now approximating 20 years, of freight cars in service, and covering representative periods of both heavy and light traffic, would produce more accurate results than a period of 5, 10, or 15 years.

It does not appear that theretofore the railroads had ever considered using a period as long as 20 years for this purpose. In the studies which the AAR presented in connection with the 1949 decision a 10-year period, 1936-1945, was used, and the ratio so arrived at was 86.15 per cent. The 20-year period in the 1949 report covered 1927-1946 and produced a ratio of 80 per cent, the ratio used by the Commission in its "reallocated" costs, which as before shown, were higher than those relied on by the AAR.

Notwithstanding the fact that the Commission's conclusions with respect to the car-utilization ratio were of much potential value to the car-owning railroads, they were not immediately adopted. In the studies which led to the $1.75 charge a period of 15 years, 1934-1948, was used to arrive at a ratio of 86.12 per cent. Originally in the next studies relating to the $2 charge the 15-year period, 1936-1950, was used, and the resulting ratio was 89.13 per cent. However, apparently the General Committee was of the view that due deference to the Commission's views made it advisable to use the 20 years 1931-1950 and thereby reduce the ratio to 82.75 per cent, incidentally increasing the estimated cost by about 15 or 16 cents per day. In the studies on which the present charge was based a 20-year period, 1933-1952, was used, giving a percentage ratio of 86.05 per cent.

In contrast to the ratios above shown, 86.12, 82.75, and 86.05 per cent, are the following actual ratios for the years shown:

Year	*Per cent*
1949	90.39
1950	91.34
1951	94.27
1952	93.59

If the Commission's observations concerning the 20-year period were intended as a general principle for future guidance of the railroads, the present proceeding affords an appropriate opportunity for further consideration of the question. The period gives undeserved weight to condi-

tions in years prior to 1941 which were in a wholly different economic era from that of succeeding years.

For the period from 1933 to 1940, inclusive, the average annual ownership of cars by class 1 railroads was 1,806,065. Because of depressed industrial activity there were large numbers of surplus cars, and the percentage of unserviceability ranged from 8.8 to 15. The car-utilization ratio consequently ranged from 63.98 in 1933 to 84.16 in 1940.

On the other hand, in the years from 1941 to 1952, inclusive, the class 1 railroads' annual ownership of cars averaged 1,738,696. Those carriers were able to carry the heavy traffic of the war and post-war periods because of the greater average capacity of the cars increased train speeds and other means of greater efficiency, including a reduction in percentage of unserviceability to a range between 2.7 and 6.9. Car surpluses after 1940 were negligible in comparison with those of the earlier period.[5] The car-utilization ratio, therefore, between 1941 and 1952 ranged between 90.39 and 96.67. In 1952, the latest year for which figures are to be found in the record, the ratio was 93.59, as before shown. Although the ratio undoubtedly declined in 1953 and 1954, it is doubted whether the

5 Complainants show that maximum freight-car surpluses in 1933-1940 ranged from 190,370 on March 14, 1940 to 691,587 on January 31, 1933. Minimum surpluses in the same period ranged from 64,299 on October 14, 1939 to 385,137 on October 31, 1933. In the period 1941-1952 maximum surpluses ranged from 23,416 on October 20, 1945 to 207,627 on November 5, 1949. Minimum surpluses ranged from 673 on October 23, 1948 to 38,511 on October 4, 1941.

figure has fallen below 90. If so, supplementary figures may be furnished before submission of the case.

The mere fact that freight cars have an average life of about 20 years affords little or no ground for assuming that their probable utilization in any given future year will be the same as that for the average of the past 20 years. There is no reason to believe that economic cycles are so marked.

If the 20-year period is adopted as a permanent yardstick, the statistics for years from 1941 to 1952 will continue to have a varying influence until 1971. Within that future time there may well be changes which will cause the 1941-1952 period to be regarded as abnormal. By 1960 when the favorable influence of the prewar years will have entirely disappeared there may be less satisfaction with the 20-year yardstick.

For the reasons above indicated it is here concluded that that yardstick should be discarded. The proposed findings therefore reflect a car-utilization ratio of 90 per cent.

Conclusions—In accordance with the views before expressed the figures submitted by the complainants have been modified in the following respects: (1) The item for freight-car repairs and the allocations based thereon are treated in the same manner as they were in the 1949 report. (2) Depreciation for freight cars and shops, enginehouses, power plants etc., is based on undepreciated ledger values. (3) Return on investment is based on 10 per cent of depreciated ledger value. (4) Return on investment in shops, enginehouses, power plants, etc., is based on 6 per cent of depreciated ledger value. (5) The car-day divisor is based

on a car-utilization ratio of 90 per cent. The figures as so modified are as follows:

ESTIMATED AVERAGE COSTS PER ACTIVE CAR-DAY[6]

	1948	1950	1952
	Cents	*Cents*	*Cents*
Cost of freight-car repairs	70.01	74.06	88.42
Deadhead haulage of freight-car repair material	2.03	2.13	2.54
Charges to depreciation of freight cars	24.28	26.86	28.84
Charges account of maintenance and depreciation of shops	6.03	5.46	6.18
Miscellaneous maintenance of equipment accounts	4.69	5.48	6.67
Allocated proportion of general expense	3.20	3.58	4.48
Interest on freight-car value	39.46	41.19	50.03
Interest on value of repair shops	2.24	2.29	2.30
Interest on investment in stock of freight-car repair material	0.50	0.53	0.63
Interest on working capital	0.47	0.50	0.60
Cost of certain taxes	10.89	11.68	13.29
Totals	163.80	173.76	203.98

[6] The working papers underlying these computations are available for inspection in the office of the Cost Finding Section of the Commission's Bureau of Accounts Cost Finding and Valuation.

Additional labor, material and payroll taxes to reflect increased cost levels as of May 1, 1949 and wages of January 1, 1949	4.96		
Same as of April 1, 1951		12.07	
Same as of April 1, 1953			1.81
	168.76	185.83	205.78

Car ownership adjusted to car utilization ratio of 90 per cent:

1948—583,286,368 car days
1950—578,535,476 " "
1952—585,970,978 " "

As before stated, the Susquehanna refused to pay the charge of $1.75 after April 1, 1951, and it is therefore unnecessary to consider whether the charge was unreasonable before that date. The table above shows a cost of $1.8583 as of April 1, 1951, and therefore indicates that the charge of $1.75 from that date to April 30, 1952, was not unreasonable. Similarly, the table indicates that the average cost in 1952 and 1953 was at least $2.0398, which was slightly higher than the charge of $2 in effect during the greater part of those years. The present charge of $2.40 is considerably higher than the cost of approximately $2.06 shown in the table, and it is therefore concluded that a reasonable charge under present conditions would be $2.10.

The Susquehanna in its requested findings suggests that there is a "zone of reasonableness" sufficiently wide to include the amounts for which it seeks approval as not "unjust or unreasonably low or noncompensatory for the periods of their effectiveness, and were within the zone of reasonableness. Although the Commission at p. 389 of the 1949 report said that "there is a rather wide zone of reasonableness within which the carriers may establish a lawful per diem rate," the statutory authority of the Commission over per diem rates is not so worded as to indicate that the authority may be exercised merely by defining the upper or lower limits of a zone of reasonableness, as in the case of freight rates.

The Commission should find and declare that the per diem charges of $1.75 *and* $2 *were reasonable during the periods in which they were effective and that a reasonable charge for present use would be* $2.10.

A declaratory order should be entered.

APPENDIX

Interveners in support of Complainants—The Chesapeake and Ohio Railway Company; Chicago, Rock Island and Pacific Railroad Company; The Delaware and Hudson Railroad Corporation; the Delaware, Lackawanna and Western Railroad Company; Erie Railroad Company; Louisville and Nashville Railroad Company; Minneapolis, St. Paul and Sault Ste. Marie Railroad Company; New York Central Railroad Company; The New York, Chicago and St. Louis Railroad Company; Northern Pacific Railroad Company; Southern Pacific Company; Union Pacific Railroad Company; Texas and New Orleans Railroad Company; Western Maryland Railway Company.

Interveners in support of Defendants—The Ahnapee and Western Railway Company; Alexander Railroad Company; The Atlantic and Danville Railway Company; Bamberger Railroad Company; Bath and Hammondsport Railroad Company; Beaufort and Morehead Railroad Company (A. T. Leary, Lessee); Belfast and Moosehead Lake Railroad Company; Butte, Anaconda & Pacific Railway Company; Charles City Western Railway Company; Chattahoochee Valley Railway Company; Chesapeake Western Railway; Chicago, West Pullman & Southern Railroad Company; City of Prineville Railway; Craig Mountain Railway Company; Detroit and Mackinac Railway Company; Escanaba and Lake Superior Railroad Company; Flemingsburg and Northern Railroad Company; Fort Dodge, Des Moines & Southern Railway Company; Genesee and Wyoming Rail-

road Company; Georgia, Ashburn, Sylvester & Camilla Railway Company; The Georgia Northern Railway Company; Hampton & Branchville Railroad Company; High Point, Thomasville & Denton Railroad Company; Howard Terminal Railway; Jerseyville & Eastern Railroad Company; Kentucky and Tennessee Railway; Lackawanna and Wyoming Valley Railroad Company (E. McLain Watters, Trustee); Lake Erie, Franklin & Clarion Railroad Company; Lakeland Railway; Live Oak, Perry & Gulf Railroad Company; Maryland and Pennsylvania Railroad Company; Minneapolis, Northfield and Southern Railway; Morehead and North Fork Railroad Company; The Narragansett Pier Railroad Company, Inc.; Nelson & Albemarle Railway Company; Norwood & St. Lawrence Railroad Company; Oregon & Northwestern Railroad Co.; Oregon Pacific and Eastern Railway Company; Paris and Mt. Pleasant Railroad Co.; Pearl River Valley Railroad Company; The Pittsburg & Shawmut Railroad Company; Rahway Valley Company (Rahway Valley Company, Lessee); Roscoe, Snyder and Pacific Railway Company; St. Marys Railroad Company; San Francisco and Napa Valley Railroad; The San Luis Central Railroad Company; Santa Maria Valley Railroad Company; Savannah & Atlanta Railway Company; The South Georgia Railway Company; Tennessee, Alabama & Georgia Railway Company; Trona Railway Company; Ventura County Railway Company; Virginia Blue Ridge Railway; Washington and Old Dominion Railroad; Washington, Idaho & Montana Railway Company.

Order of the Interstate Commerce Commission

ORDER

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C., on the 17th day of October, A. D. 1955.

No. 31358

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY ET AL.
NEW YORK, SUSQUEHANNA & WESTERN RAILROAD COMPANY ET AL.

This proceeding being at issue upon complaint and answers on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been made, and the Commission having, on the date hereof, made and filed a report containing its findings of fact and conclusions thereon, which report is hereby referred to and made a part hereof:

It is ordered, That this proceeding be, and it is hereby, discontinued.

By the Commission.

HAROLD D. McCOY,
Secretary

(SEAL).

LIBRARY
SUPREME COURT, U.S.

No. 310

Office-Supreme Court, U.S.
FILED
SEP 24 1958
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958.

BOSTON AND MAINE RAILROAD; THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY; THE NEW JERSEY AND NEW YORK RAILROAD COMPANY, HORACE BANTA, TRUSTEE; THE LONG ISLAND RAIL ROAD COMPANY,

Appellants,

against

UNITED STATES OF AMERICA; INTERSTATE COMMERCE COMMISSION, ET AL.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS.

MOTION TO AFFIRM.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958.

No. 310.

BOSTON AND MAINE RAILROAD; THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY; THE NEW JERSEY AND NEW YORK RAILROAD COMPANY, HORACE BANTA, TRUSTEE; THE LONG ISLAND RAIL ROAD COMPANY,

Appellants,

against

UNITED STATES OF AMERICA; INTERSTATE COMMERCE COMMISSION, ET AL.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS.

MOTION TO AFFIRM.

The railroads appellees in the above-entitled case move to affirm on the ground that the questions presented on this appeal are so unsubstantial as not to need further argument.

STATEMENT.

Appellants' Jurisdictional Statement includes the jurisdictional basis for this action, the opinions below, and the statutes involved, and there appears to be no need to set them out in detail here. Briefly, this is an appeal in a statutory three-judge court action (28 U. S. C. § 1336) involving an order of the Interstate Commerce Commission (*Chicago B. & Q. R. Co.* v. *New York, S. & W. R. Co.*, 297 I. C. C. 291). Appellants are four of some 27 plaintiffs in the court below, and were successful there in securing a judgment setting the Commission's order aside and remanding the cause to the Commission for further proceedings. *Boston & M. R. R.* v. *U. S.*, U. S. D. C. Mass., 162 F. Supp. 289 (April 28, 1958).

Although successful in securing vacation of the Commission's decision and return of the case to the Commission, appellants seek on this appeal to question the correctness of the District Court's rulings on certain contentions advanced by some of the plaintiffs below. The purported basis for appealing at this interim stage of the controversy is that the adverse rulings of the District Court may become *res judicata* as to the issues involved (Appellants' Jurisdictional Statement, pp. 3-4). The appellees filing this Motion to Affirm were intervening defendants in the lower court, and are cross-appellants in No. 322.

Appellants' Jurisdictional Statement lists five questions presented (pp. 4-5). Analysis of them shows that three issues are raised: First, whether the Commission had jurisdiction to entertain the form of proceeding here involved, i. e., a declaratory judgment action under Section 5(d) of the Administrative Procedure Act (5 U. S. C.

1004(d)) to settle a dispute among the railroads as to the reasonableness of certain freight car hire rates. Second, whether, if such jurisdiction exists, the Commission could render a declaratory ruling that certain stated amounts constituted the reasonable rates of compensation which car users should pay and car owners should receive, on a uniform basis, for the use of freight cars during specified periods, as distinguished from fixing merely the upper and lower limits of a "zone of reasonableness" of freight car rental within which car users might be free to offer less than the rate of compensation demanded by car owners. And third, whether the effort by the railroad appellees to secure through the Commission's processes a resolution of the controversy over freight car rental rates constituted, as to non-assenting railroads, a step in furtherance of a conspiracy in violation of the Sherman Act, to which the Commission should have refused to lend its aid. One of the appellants, the Long Island Railroad, disassociates itself from the Sherman Act contention (Jurisdictional Statement, footnote p. 3).

The context in which these questions arise is set out in the opinion below (162 F. Supp. 289, 291-4) and is summarized in the Jurisdictional Statement filed in No. 322. In short it is that when the rental rate for railroad-owned freight cars established and theretofore generally observed by the railroads was increased from $2 per day to $2.40 per day on August 1, 1953, certain railroads, including appellants, served notice on all other railroads, including appellees, that they would not pay the higher rate but would continue to pay the $2 rate, or something less. Appellee railroads, either as complainants or as supporting intervenors, instituted a proceeding before the Interstate Commerce Commission on September 21, 1953, asking for a declaratory ruling that the then current rate, and the two rates of $1.75 per day and $2.00 per day

which had preceded it, were just, reasonable and otherwise lawful compensation for the use by one railroad of a freight car owned by another railroad.

The Commission took jurisdiction, conducted hearings, heard argument, and issued a report in which it found and declared that the three car-hire rates were not in excess of reasonable compensation during the respective periods of their effectiveness, and that lower rates, in the opinion of the Commission, would not have been compensatory. 297 ICC 291, 308. In its rulings on the merits of the cost-finding and rate-making issues involved the Commission followed an earlier (1949) decision in a similar car-hire controversy between substantially the same groups of carriers. *Alabama T. & N. R. Co.* v. *Aberdeen & R. R. Co.*, 274 ICC 383.

The District Court considered at some length, and rejected, appellants' contention that the Commission had no statutory authority to entertain a declaratory judgment proceeding and to make findings of retroactive legal consequence concerning freight car rental rates. 162 F. Supp. 289, 295. The Court also, in two sentences, disposed of the argument that the Commission should have refused to entertain this proceeding because the instituting of it was an act in furtherance of an anti-trust conspiracy. 162 F. Supp. 289, 300. However on a certain issue relating to the formula or basis for computing car hire the Court ruled that the Commission had made inadequate findings, and on this ground set the Commission's order aside and remanded the case to the Commission for further proceedings. The cross-appeal in No. 322 brings into question the propriety of the District Court's action in setting the Commission's order aside.

ARGUMENT.

There Is No Substance to the Contention That the Commission Lacked Jurisdiction to Make the Declaratory Ruling Under Review.

Section 5(d) of the Administrative Procedure Act explicitly gives the Commission authority "in its sound discretion, with like effect as in the case of other orders, to issue a declaratory order to terminate a controversy or remove uncertainty" (5 U. S. C. § 1004(d)). Appellants attempt to avoid this plain language by contending that the Commission has only rule-making power, not adjudicative power, with respect to car hire, and hence cannot make a declaratory adjudication as to the reasonableness in the past of freight car rental rates. The necessary premise, and basic fallacy, of this argument is expressed in the second of the Questions Presented (Jurisdictional Statement, p. 5), and is that, absent any preexisting exercise of admitted rule-making power by the Commission, the Interstate Commerce Act does not impose as between railroads any obligation with respect to receiving or paying car-hire "(other than the obligation imposed by Section 1(4) with respect to the operation of through routes)."

Putting aside for the moment the quoted qualification, what appellants are saying is that unless the Commission has prescribed car hire rates under Section 1 (14)(a), the Interstate Commerce Act imposes no duty upon a railroad using a freight car owned by another railroad to pay reasonable compensation to the owner of the car for such use, and that since no duty in this regard exists under the statute, there is no basis for a complaint to the Commission by a car owner concerning a breach of such duty,

either to secure an award of damages or a declaratory ruling as to respective rights and liabilities. The Court below found no merit in this contention for the obvious reason that Congress, exercising Constitutional authority through Section 1(11) of the Act, among others, has required railroads to permit their freight cars to go off line and be used by other railroads in serving the public, and there can be no escape in this situation from an obligation on the part of the user to pay reasonable compensation to the owner for such use. *Chicago R. I. & P. Ry. Co.* v. *U. S.*, 284 U. S. 80, 96-7.

The qualification quoted earlier highlights the flaw in appellants' argument. As indicated above, appellants' denial of jurisdiction in the Commission to make a declaratory adjudication necessarily rests on the claim that, absent a prescription of freight car rental by the Commission, there is no duty on car users and car owners to pay and receive reasonable—and only reasonable—compensation for the use of freight cars. However, Section 1(4) of the Act* stands directly in the path of appellants' argument, for that section expressly imposes upon every rail-

* Section 1(4) of the Act (49 USC § 1(4)) is not quoted in appellants' jurisdictional statement. It is as follows:

"(4) It shall be the duty of every common carrier subject to this part to provide and furnish transportation upon reasonable request therefor, and to establish reasonable through routes with other such carriers, and just and reasonable rates, fares, charges, and classifications applicable thereto; and it shall be the duty of common carriers by railroad subject to this part to establish reasonable through routes with common carriers by water subject to part III, and just and reasonable rates, fares, charges, and classifications applicable thereto. It shall be the duty of every such common carrier establishing through routes to provide reasonable facilities for operating such routes and to make reasonable rules and regulations with respect to their operation, and providing for reasonable compensation to those entitled thereto; and in case of joint rates, fares, or charges, to establish just, reasonable, and equitable divisions thereof, which shall not unduly prefer or prejudice any of such participating carriers."

road the affirmative and continuing duty to provide transportation on reasonable request; to establish reasonable through routes with other railroads, and reasonable rates applicable thereto; to provide reasonable facilities and regulations for operating such through routes, including "providing for reasonable compensation to those entitled thereto," and, where joint rates are in effect, providing for just and equitable divisions thereof. Thus, in the case of a through route there is no room for argument about the existence of a continuing obligation by one participating railroad to pay reasonable compensation to another participating railroad for facilities furnished and used in the performance of transportation service over such through route; and a breach of that obligation as between railroads gives rise to a claim for damages under the Act in the same way, and upon the same authority, that a breach of the railroads' duty to charge only reasonable rates to a shipper served on the through route would give rise to complaint by the shipper for an award of reparation.

It is for this reason that appellants must make an exception for Section 1(4) in claiming that no duty rests upon a car-using railroad under the Interstate Commerce Act to pay the owner reasonable compensation for the use of the car, and hence that the Commission had no jurisdiction in the present case. However, making the inescapable exception necessarily involves contending that Congress has permitted one railroad to appropriate and use the cars of another railroad without a reviewable and enforceable obligation to pay reasonable compensation to the owner, so long as the cars are not engaged in operating a through route to which the owner is a party. Appellants do not, of course, state the point so bluntly in their argument; indeed the allusion to it is most indirect (see Jurisdictional Statement, p. 20, footnote 13). Neverthe-

less, if appellants' argument were sound, the regulatory anomaly would inevitably be present that a railroad would be under a statutory duty to pay reasonable compensation for the use of a freight car when the user and the owner were parties to a through route existing expressly, impliedly or by prescription, but would be under no statutory duty to pay reasonable compensation to the owner for a car which the user appropriated and employed in local service on its own lines, or which it appropriated and used in joint service with other railroads so long as the car were kept out of a through route in which the owner participated.

It is unnecessary to examine this consequence of appellants' argument in the light of the constitutional limitations recognized in *Chicago, R. I. & P Ry. Co.* v. *U. S.*, 284 U. S. 80. As the Court below correctly held, Congress has plainly imposed upon all railroads the general obligation—applicable without regard to the existence of through routes—to provide adequate car service and to establish reasonable rules, regulations and practices with respect thereto (Sec. 1(11)). Since "car service" by definition (Section 1(10)) includes the supply, use, exchange, interchange and return of freight cars, the reasonable practices required of each railroad in connection therewith necessarily includes payment of reasonable compensation, and the exaction of no more than reasonable compensation, for the use of cars not owned by the user. From this conclusion it plainly follows, as the District Court held, that the Commission has authority under Section 13(1) and Section 16 to entertain complaints and award damages with respect to past car hire charges (162 F. Supp. 289, 295), and since the Commission's authority to make an adjudi-

cation is clear, there is no substance to the contention that the Commission lacked power in this proceeding to make the declaratory ruling requested of it.*

II.

There Is No Substance to the Contention That the Commission Could Not in the Exercise of Its Jurisdiction Find a Single Uniform Rate of Car Hire to Be Just and Reasonable Compensation in the Past as Between Car Owners and Users.

Appellants' second basic contention, expressed in the third and fourth Questions Presented (Jurisdictional Statement, p. 5) is that if a statutory duty has been prescribed with respect to paying and receiving car hire it does not extend beyond an obligation on the part of a car owner not to receive an unreasonably high rate, and an obligation on the part of the user not to pay an unreasonably low rate; and that the Act does not require, nor empower the Commission to require, uniform observance by owners and users of specified car-hire rates when not prescribed by the Commission in the exercise of its rule-making power. In other words, the argument is that the limit of the Commission's adjudicative power over past car hire is to fix a "zone of reasonableness" within which, presumably, car users may insist upon bargaining with car owners

* Although not determinative of the question, the Commission has for many years and in numerous instances ordered or authorized retroactive car hire settlements. E. g. *Owasco River Ry.*, 53 ICC 104, 113 (1919); *Valley and Siletz RR. Co.* v. *Sou. Pac. Co.*, 80 ICC 724, 731 (1923); *Lime Rock RR. Co.* v. *M. C. RR. Co.*, 102 ICC 48, 52 (1925). Moreover, in the 1949 Per Diem Case cited above, the Boston and Maine and the New Haven, appellants here, sought (along with a number of other complainants) an award of reparation on account of the past exaction from them of alleged unreasonable car hire charges, thereby invoking the jurisdiction which they now contend the Commission does not have. *Alabama T. & N. R. Co.* v. *Aberdeen & R. R. Co.*, 274 ICC 383, 384.

over car hire claims. This argument is given a Sherman Act coloration by weaving into it the contention that such latitude is necessary in order that there may be preserved to all railroads which are parties to the industry agreement for dealing with car service matters the "free and unrestrained right to take independent action" which is guaranteed by Section 5(a)(6) of the Interstate Commerce Act.*

The Commission rejected the contention that only a "zone of reasonableness" should be delineated on the ground that the concept is not compatible with fixing compensation for the use of property. (297 ICC 291, 307.) The District Court did not deal expressly with the point, but its discussion of the merits of the case indicates plainly an acceptance of the proposition that the form and manner in which car hire rates are to be fixed is a matter within the Commission's discretion, subject to appropriate judicial review. This is also clearly the tenor of *Chicago, R. I. & P. R. Co.* v. *U. S.*, 284 U. S. 80.

Moreover, appellants themselves demonstrate the unsubstantiality of the question presented by recognizing (Jurisdictional Statement, p. 21) that the Commission "in the exercise of its undoubted rule-making power" might find that relevant circumstances reasonably warranted the prescription of "a uniform rule for the calculation of car-hire applicable to all railroads." The argument that this result cannot follow where the car hire

* The procedures under which the railroads handle various matters relating to car service were approved by the Commission in 1950 in *Association of American Railroads—Agreement*, 277 ICC 413. One phase of the present controversy over car hire rates has been an attack by the Boston and Maine and the New Haven, among others, on the procedures by which the rates are established. With a modification not responsive to the attack of those two appellants the procedures were again approved by the Commission on March 7, 1957 (*Ahnapee & W. Ry. Co.* v. *Akron & B. B. R. Co.*, 302 ICC 265).

rates in controversy were established not by the Commission "but by private agreement of the owners of a majority of the freight cars" is plainly without merit since the Commission's authority to prescribe and to adjudicate arises from the same source in the statute, as the Court below correctly held.

III.

There Is No Substance to the Contention That the Commission Should Have Declined to Entertain This Proceeding.

The third issue tendered by appellants on this appeal is whether the Commission should have refused to exercise its jurisdiction on the ground that the proceeding before it was a step in furtherance of an anti-trust conspiracy by car owners to force non-assenting car users to pay car hire rates fixed by the car owners. The District Court rejected the contention summarily, saying "we are so little impressed by the argument that we see no need either to specifically refute it or even to state it in detail." (162 F. Supp. 289, 300.)

No more need be said here than to point out that the contention seems necessarily to rest upon the untenable assumption that the Commission has a different sort of jurisdiction over past car hire rates and practices than it has over such rates and practices for the future. As the District Court correctly held, the Act imposes continuing rights and duties upon the railroads concerning car service, and confers coextensive jurisdiction upon the Commission in connection therewith. A ruling by the Commission as to what was the reasonable car hire rate to be paid and received in the past has no different legal basis than a similar ruling of prospective application, insofar as it determines the rights and obligations of affected rail-

roads, assenting or not. It is wholly irrelevant that a past rate which the Commission is called upon to appraise originated through the industry's rate making procedures rather than by Commission prescription, or that some of the railroads subject to the rate (when and if approved by the Commission) withheld their assent from its original establishment. The important and relevant fact demonstrating the unsubstantiality of appellants' contention is that the agency whose processes the "car owners" were compelled to invoke for a review of the rates which the "car users" were refusing to pay was the one agency of government having primary jurisdiction of the subject matter and power through its decision to protect the "car users" from the price-fixing conspiracy charged to exist.

Conclusion.

We respectfully submit that the foregoing arguments show that the District Court ruled correctly on the questions sought to be presented on this appeal, and that the questions are so unsubstantial as not to need further argument. Accordingly we respectfully move that the rulings of the District Court upon which appellants have based their appeal be affirmed.

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NO. 310

IN THE

Supreme Court of the United States

OCTOBER TERM 1958

BOSTON AND MAINE RAILROAD; THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY; THE NEW JERSEY AND NEW YORK RAILROAD COMPANY, HORACE BANTA, Trustee; THE LONG ISLAND RAIL ROAD COMPANY,

Appellants,

against

UNITED STATES OF AMERICA; INTERSTATE COMMERCE COMMISSION *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS.

BRIEF IN OPPOSITION TO MOTION TO AFFIRM

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No. 310

BOSTON AND MAINE RAILROAD; THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY; THE NEW JERSEY AND NEW YORK RAILROAD COMPANY, HORACE BANTA, Trustee; THE LONG ISLAND RAIL ROAD COMPANY,

Appellants,

against

UNITED STATES OF AMERICA; INTERSTATE COMMERCE COMMISSION; ET AL.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS.

BRIEF IN OPPOSITION TO MOTION TO AFFIRM

Appellants respectfully submit this brief in opposition to the motion of the railroad appellees "that the rulings of the District Court upon which appellants have based their appeal be affirmed".

1. This Appeal Raises Substantial Questions as to Commission Jurisdiction to Make the Declaratory Order Under Review.

Appellees' argument concedes that a declaratory order under §5(d) of the Administrative Procedure Act can only be issued "within jurisdiction delegated to the agency" as provided in §9(a) of that Act. Appellees (as did the District Court) rely on §§13(1) and 16 of the Interstate Commerce Act as constituting such delegation, upon the theory that §1(11) of the Act imposes on every car-user a statutory duty to pay reasonable compensation for the cars of others.

In support of this theory they suggest (p. 6) that if the statute does not impose such a duty, the car-owner will have *no* enforceable right to compensation, ignoring the quasi-contractual obligation resting on the shoulders of everyone who uses the property of another to compensate the owner fairly therefor. §22(1) of the Act pertinently provides

> ". . . nothing in this part contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this part are in addition to such remedies".

In view of the clear and adequate remedy which the common law affords to all car owners, the intimation that a decision adverse to Commission jurisdiction would subject appellees' property to confiscation is not worthy of serious consideration.

Appellees' remaining argument on this question is based upon an attempted analogy to §1(4), which imposes the statutory duty on carriers establishing through routes "to provide reasonable facilities for operating such routes and to make reasonable rules and regulations with respect to their operation, and providing for reasonable compensation to those entitled thereto". They purport to find in this statutory direction the imposition on each through-route participant of a duty unilaterally to pay reasonable compensation to its fellow through-route participants,—a duty that is basically different from an obligation to act jointly with its fellow through-route participants in making pertinent rules and provisions in connection with their joint operation of through routes.

This attempted analogy completely ignores (as does appellees' argument) the very striking difference between §1(4) which expressly refers to "compensation" and §§1(10) and (11) which do not,—although significantly §1(14)(a) explicitly includes "compensation" among the subjects over which the Commission is given regulatory (*i.e.* prescriptive) power. The same argument was made

to this Court in *Chicago, R. I. & P. Ry. Co.* v. *United States,* 284 U. S. 80 (1931), where it was contended that the operational duty imposed on carriers by §1(12) "to make just and reasonable distribution of cars for transportation of coal among the coal mines served" included compensation for the use of the coal cars. This Court rejected that argument.*

Moreover, with regard to §1(4) itself, appellees by asserting that an obligation *jointly to provide for* is an obligation *unilaterally to pay* are merely attempting to dispose of the question of what duty is imposed by §1(11) by assuming the answer to a similar question if asked with respect to §1(4); and the answer to that other question (*i.e.* what duties are imposed by §1(4)?) is not the answer which the appellees assume.

The reasoning by which appellees would support Commission jurisdiction under §1(4) to award reparation in respect of car-hire would equally support such jurisdiction in respect of divisions. Indeed, prior to the 1920 Act, divisions as well as car-hire fell under the identical clause of §1(4) on which appellees base their argument (*Morgantown and Kingwood Divisions,* 49 I. C. C. 540). It is well settled, however, that except as some other section of the Act may have been violated (*e.g.,* §3, *Western Pacific Railroad Co.* v. *Southern Pacific Co.,* 55 I. C. C. 71), the only jurisdiction enjoyed by the Commission over divisions before or since the 1920 Act is its regulatory (prescriptive) jurisdiction under §15 (*Brimstone Railroad Co.* v. *United States,* 276 U. S. 104, 121, 1928).

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* "The object of this provision was to insure a proportional distribution of all available coal cars so as to afford a fair and equal opportunity to each mine to enjoy their use on the basis of its rating. *Baltimore & O. R. Co.* v. *Lambert Run Coal Co.,* 267 Fed. 776, 779. It has nothing to do with the question of compensation for the use of cars by non-owning railroads. That subject, as already appears, is covered by §1(14)." *Chicago, R. I. & P. Ry. Co.* v. *United States,* 284 U. S. 80 at 99.

Appellees (p. 7) compare the car-owner seeking to collect car-hire to a shipper complaining of the exaction of unreasonable rates, but the analogy fails at one essential point. Where relations between carriers are involved, Congress has generally left them to be worked out in the first instance by mutual agreement (cf. §5a). If the carriers involved fail to reach mutual agreement, the Commission is not authorized to make an agreement for them; it exercises its regulatory power, explicitly granted under §15(3), to *establish* a through route, or to *prescribe* a division (*I. C. C.* v. *Columbus and Greenville Railway*, 319 U. S. 551, 555, 1943; *Brimstone Railroad Co.* v. *United States*, 276 U. S. 104, 1928). Appellees have suggested no reason why the same principles should not apply to car-hire and other like matters normally the subject of inter-carrier agreements.

The duty actually imposed by §1(11) is the duty to establish "just and reasonable rules, regulations, and practices with respect to car service" and to observe and enforce the same once they have been established. That Congress here had particularly in mind rules, regulations, and practices which affect shippers clearly appears from §1(13), which authorizes the Commission to require the same to be filed and incorporated in the respective carriers' "schedules showing rates, fares, and charges for transportation".

In *Palmer* v. *United States*, 75 F. Supp. 63 (D. D. C., 1947) the statutory Court in analyzing the scope of the Commission's rule-making powers under §1(14)(a), pointed out (at pp. 69, 71, 72) the differences in the statutory scheme between operational rules and rules establishing compensation,—the former affecting the public interest, the latter being purely inter-carrier.

The duty "to establish" is imposed by §1(11) on "every carrier by railroad"; that is, on each individual carrier. Insofar as the "rules, regulations and practices" involve a single railroad, they can, of course, be established by its

own unilateral action. But assuming, as appellees assume, that practices with respect to the payment of compensation between carriers are also impliedly included in §1(11), the only way such practices can be established is by agreement between the railroads involved, since neither car-owner nor car-user has the lawful power to do so unilaterally (cf. *Alton Railroad Co.* v. *United States*, 287 U. S. 229, 236, 1932).

Thus, whether or not the subject matter of compensation is to be read into §1(10)'s definition of "car service" and hence into the duties imposed on carriers by §1(11), the only way in which *any* car service rule or practice involving more than one carrier can be established under §1(11) is by mutual agreement and joint action of all of the carriers involved. And under §1(11) the duty resting on "every carrier" to establish "just and reasonable" rules and practices "with respect to car service" can only be the duty on every carrier individually to make a good faith effort to arrive at agreement and joint action with the other carriers involved;—failing the success of which the Commission has the power to step in and exercise its prescriptive rule-making authority under §1(14)(a) either on complaint or on its own initiative. But the Commission does not have the power,—as appellees argue it has,—to make the agreement for the carriers (or to determine by declaratory order the agreement which it thinks the carriers should have made, which is in substance the same thing).

The declaration of unlawfulness at the end of §1(11) subjects a violator to penal consequences under §10. Consequently appellees' assertion that a duty *jointly to establish* should be transformed by interpretation into a duty *unilaterally to pay* "would do violence to the well-established principle that penal statutes are to be construed strictly" even in a non-criminal case. (*FCC* v. *American Broadcasting Company*, 347 U. S. 284, 296, 1954.) This same principle applies to confirm the view that "compensation" is not to be read by implication into §1(11)'s im-

position on carriers of duties respecting the purely operational practices specified in §1(10).

So long as appellants adhered to the charges fixed under the §5a agreement, that agreement did establish their practices with respect to the payment of car-hire. But as soon as they gave notice that they were dissatisfied with the rates fixed under the industry agreement and would no longer be bound thereby, it ceased to be their agreement, or to establish their practices, in that regard.

That appellants have not succeeded in reaching separate agreements with appellees on car-hire is not due to any failure on appellants' part to perform their duty (if such there be) to make a good faith effort to reach agreement. Rather it is due to *appellees'* insistence that the car-hire charges fixed under the industry agreement shall be imposed on appellants not because *appellants* have agreed to them—the agreement itself, §5a(6) of the Act, and the complaint before the Commission make it abundantly clear that they have not—but because *appellees* have agreed to them (cf. *Alton Railroad Co.* v. *United States, supra,* 287 U. S. 229, 236).

The least that §5a(6) can mean is that appellees were not justified in this insistence,—and that it was they, not appellants, who failed to perform their duty, if any (respecting compensation under §1(11)), of attempting in good faith to achieve mutual agreement with appellants. And in any event (as pointed out above) such a failure, we submit, would not, and a *fortiori* would not *unquestionably,* ground a proceeding in reparation and thus serve as foundation for Commission jurisdiction in this case.

2. This Appeal Raises Substantial Questions as to Whether the Commission by Adjudicatory Order Can Declare that a Single Uniform Rate of Car Hire Not Theretofore Precribed by it is Binding on All Railroads.

Asserting that the Commission has jurisdiction to make a declaratory order in this proceeding, appellees also assert

that the Commission is authorized by such an order to enforce payment of the uniform car rental prices which they have fixed under their industry agreement, provided the Commission has found that those prices are "not in excess of reasonable compensation". This most clearly appears from the moving appellees' characterization (p. 12) of appellants as "railroads subject to the rate (when and if approved by the Commission)" which they have so fixed, and of the proceeding as one seeking Commission "review" of the charges so fixed. That the Commission and the District Court took the same view of the proceeding before the Commission, and gave their approval on that basis is not denied, and the Commission's conclusion,—upon which the District Court's holding of Commission jurisdiction is predicated,—namely, that the industry-fixed rates of rental charge are binding upon all users if "not in excess of reasonable", admits of no other interpretation.

Appellees' assumption (p. 12) that the Commission was "called upon to appraise" the car-hire charges fixed by *appellees,* as the criterion determinative of whether *appellants* had performed their statutory duty is, indeed, tantamount to an assumption that appellees, as the dominant segment of the industry, had regulatory power to fix the standards with which all others must comply, subject to Commission review in the same way that the Commission's orders are subject to review by a court.

Other questions arising in this connection are brushed aside or ignored by appellees and we deem it unnecessary here to add to what we have already said in our Jurisdictional Statement,—except that as to the Commission's lack of power to establish per diem charges retroactively, we further respectfully refer the Court to the concurring opinion of Commissioner Alldredge in *Alabama T. & N. R. Co.* v. *Aberdeen & Rockfish R. Co.*, 274 I. C. C. 383 (1949), at pp. 399-400.

Appellees' statement (p. 11) that "the Commission's authority to prescribe and to adjudicate arises from the same source in the statute" emphasizes the fallacy under-

lying appellees' argument: it assumes that rule-making and adjudication are interchangeable functions and have interchangeable procedures, so that in an adversary adjudicatory proceeding the Commission can issue a declaratory order which will have the effect of prescribing rules, uniformly binding on those not parties to the proceeding before it as well as on those that are parties thereto, and imposing general duties for past, present and future alike. For it cannot be denied that the purpose and effect of the proceeding and of the Commission's order was to impose just such a rule, promulgated in the first instance not by the Commission but by the dominant industry group, and held by the Commission and the District Court to be binding on all—parties and non-parties alike, for past, present and future—strictly as a conclusion of law.

Whether or not such a result accords with the Congressional intent as expressed in the Administrative Procedure Act, we submit, is not only a substantial question, but a question of far-reaching implications in the field of administrative law.

3. This Appeal Raises Substantial Questions as to Whether the Commission Should Have Entertained this Proceeding.*

As we pointed out in our Jurisdictional Statement, this Court has never (to our knowledge) determined whether administrative agencies are subject to the same principle to which courts are subject under established law,—the principle that the judicial process should not be available to aid in furthering the objective of an unlawful combination or conspiracy.

The appellees sought by their complaint before the Commission an order declaring that the prices they had fixed required uniform observance by all railroads. If the im-

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* To the extent that this point asserts a violation of the Sherman Act by the moving appellees, the Long Island disassociates itself therefrom. See footnote on page 3 of our Jurisdictional Statement.

position on others than themselves of such collectively fixed prices is not exempted by statute it is clearly unlawful (*Georgia* v. *Pennsylvania R. Co.*, 324 U. S. 439, 1945; *United States* v. *Trenton Potteries Company*, 273 U. S. 392, 1926) and no Court would entertain a proceeding, the object of which was to enforce adherence to the prices so fixed (*Continental Wallpaper Co.* v. *Voight & Sons Co.*, 212 U. S. 227, 1909; *Schwegmann Bros.* v. *Calvert Corporation*, 341 U. S. 384, 1951).

Whether this attempt by appellees to force observance by others of their fixed prices was lawful or unlawful requires scrutiny of the exempting provision, §5a(9) of the Interstate Commerce Act. By that section antitrust exemption is afforded to the parties to an ICC-approved industry price-fixing agreement in two different respects only:

(i) "with respect to the making of such agreement", and

(ii) "with respect to the carrying out of such agreement in conformity with its provisions".

Appellees obviously are exempted with respect to their making the agreement under (i) above. But appellees (and the District Court) ignore the limitation imposed upon the second of the above specified exemptions. They conclude (as did the Commission) that the making of the agreement, which gave lip service to the reservation of the "free and unrestrained right to take independent action" (required by Section 5a(6)), was all that the Congressional intent was concerned with. But the very precise exemptive language of §5a(9) shows that Congress intended that the parties to a Commission-approved price-fixing agreement should be exempt from antitrust law application with respect to their conduct under said agreement only to the extent that they are engaged in "carrying out" their agreement "in conformity with its provisions".

The record shows that the price fixing-roads intended that the prices they fixed under their agreement should be

binding on all roads, regardless of,—indeed in defiance of,—Article XII of that agreement, which accords to all parties "the free and unrestrained right to take independent action" required by §5a(6). (cf. *Schwegmann Bros.* v. *Calvert Corporation*, 341 U. S. 384, 1951). They attempted coercive measures to attain that result. When these attempts failed, they sought Commission aid to accomplish and implement that objective. Asserting in their complaint that the appellants had refused to pay the prices appellees had fixed under their agreement, they asked that the Commission not only declare that their fixed prices were "not in excess of reasonable" but also that those prices required "uniform observance" by these appellants and all other roads.

This prayer put the Commission squarely on notice that what the appellee's were asking for was *not* "in conformity with"—indeed that it was directly contrary to—the provisions of their agreement. And in their principal brief to the Commission appellees again confirmed this to the Commission (see p. 13 of our Jurisdictional Statement). Nevertheless the Commission entertained the proceeding and granted the relief requested, thus effectuating the railroad-appellees' avowed objective of imposing their price-fixing determinations upon all railroads.

The Commission based its order solely on its unsupported conclusion of law that, since the industry-fixed prices were "not in excess of reasonable compensation", "It necessarily follows that lower charges . . . would not be compensatory, either at present or in the past". This legal conclusion of the Commission underlies the District Court's holding that (in the absence of mutual agreement between the roads involved) the rental-debtor roads must pay such amount of car-hire as the rental-creditor roads collectively fix, provided only that the amount so fixed does not exceed the maximum limits of "reasonable compensation".

Moving appellees argue (p. 12) that "It is wholly irrelevant that a past rate which the Commission is called

upon to appraise originated through the industry's rate making procedures rather than by Commission prescription, or that some of the railroads subject to the rate (when and if approved by the Commission) withheld their assent from its original establishment". Not only does this argument again wholly equate quasi-legislative with quasi-judicial functions and ignore the substantive and procedural differences between them which Congress explicitly specified in §§2(c)(d), 4 and 5 of the Administrative Procedure Act, but it also entirely ignores the detailed and specific limitation Congress took pains to place upon the antitrust exemption which by §5a(9) it accorded to railroads, parties to a Commission-approved agreement, as to their conduct thereunder.

It is respectfully submitted that if the statutorily-reserved right of non-assenters "to take independent action" with respect to prices collectively fixed is thus to be stripped of all substance by Commission and District Court decision, that is a substantial question which should be passed upon by this Court.

Appellees argue (p. 12) that the Commission "was the one agency of Government having primary jurisdiction of the subject matter and power through its decision to protect the 'car users' from the price-fixing conspiracy charged to exist". In this proceeding, under the view taken by the Commission and approved by the District Court, the Commission has no power to protect appellants from the results of a price-fixing combination except only to the extent that the prices fixed by that combination exceed the maximum limits of the zone of reasonableness and thus no power to afford relief from a conspiracy to manipulate car-hire charges within that zone (cf. *Georgia* v. *Pennsylvania R. Co.*, 324 U. S. 439, 460-461, 1945). As to the zone here, the Commission itself said in 1949, "there is a rather wide zone of reasonableness within which the carriers may establish a lawful per diem rate". (*Alabama T. & N. R. Co.* v. *Aberdeen & Rockfish R. Co.*, 274 ICC 383 at 389, 1949).

CONCLUSION

The motion to affirm should be denied.

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In the Supreme Court of the United States

OCTOBER TERM, 1958

BOSTON AND MAINE RAILROAD, ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL.

THE CHICAGO, BURLINGTON AND QUINCY RAILROAD, ET AL., APPELLANTS

v.

BOSTON AND MAINE RAILROAD, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

MEMORANDUM FOR THE UNITED STATES AND THE INTERSTATE COMMERCE COMMISSION

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In the Supreme Court of the United States

OCTOBER TERM, 1958

No. 310

BOSTON AND MAINE RAILROAD, ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL.

No. 322

THE CHICAGO, BURLINGTON AND QUINCY RAILROAD, ET AL., APPELLANTS

v.

BOSTON AND MAINE RAILROAD, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

MEMORANDUM FOR THE UNITED STATES AND THE INTERSTATE COMMERCE COMMISSION

These are direct appeals from the final judgment of a district court setting aside an order of the Interstate Commerce Commission entered in a proceeding initiated by a complaint filed by certain long-haul trunk-line railroads against certain short-haul termi-

nal railroads. The complaint requested the Commission to find and declare that certain *per diem* rates, established by the railroads participating in an agreement which the Commission had approved pursuant to Section 5a of the Interstate Commerce Act, constituted just and reasonable compensation to be paid as rental or *per diem* by railroads using cars owned by other railroads. The agreement provided for utilizing the services of the Association of American Railroads in establishing such charges, and that proposed increases in the *per diem* charge be submitted by letter ballot to the subscriber railroads, with each such railroad having one vote for each car owned by it.

Pursuant to this agreement and procedure, the *per diem* rate was increased in 1949, in 1952, and in 1953. Beginning with the 1949 increase, certain terminal railroads gave notice that they would no longer make settlement on the basis of rates established pursuant to the Section 5a agreement, and the trunk-line railroads subsequently instituted the complaint proceeding before the Commission. The Commission found, after lengthy hearings, that the rates established in 1949, 1952 and 1953 "were not in excess of reasonable compensation during the periods in which they were effective," and entered an order discontinuing the proceeding. The terminal railroads then filed the present action to set this aside.

The district court held that the Commission was empowered to enter a declaratory order with respect

to the reasonableness of the *per diem* charges. The opinion pointed out that Section 1 (11) of the Interstate Commerce Act imposes a duty upon the railroads to charge no more than reasonable compensation for the use of their cars by other railroads; that Section 13 (1) of the Act empowers the Commission to entertain complaints alleging excessive charges for car hire; and that Section 16 of the Act gives the Commission authority to award damages to those harmed by excessive car-hire charges. The court concluded that since the Commission has jurisdiction to award damages for past or present unreasonable charges for car hire, it has jurisdiction under Section 5 (d) of the Administrative Procedure Act to enter, in its discretion, a declaratory order with respect to the reasonableness of such charges.

On the merits, the primary ground of decision was that the Commission had erred in rejecting, "without a more thorough investigation and more detailed findings and analysis," a time-mileage method for calculating compensation urged by certain terminal railroads as more equitable than the *per diem* method approved by the Commission. The court also questioned the Commission's use of certain factors in determining the car-hire rate. The court accordingly remanded the matter to the Commission for further proceedings not inconsistent with the opinion.

In a dissenting opinion, District Judge McCarthy concluded that "the Commission was without jurisdic-

tion to enter the order in question," and stated that he would vacate the order on that ground.

We believe that the majority decision, insofar as it held that the Commission was acting within its jurisdiction in issuing a declaratory order, is correct. The statutory basis for issuing such order is set forth in the majority opinion. We would emphasize further that if the creditor carriers were to sue the debtor carriers in the appropriate district courts to collect their charges, the issue of the reasonableness of those charges would be referable as of course to the Commission. *United States* v. *Western Pacific Railroad Co.*, 352 U. S. 59. It is indisputable that there is at present a live and a general controversy as to the reasonableness of *per diem* charges, and there is no sound reason, we submit, why the Commission should not determine that issue in advance of piecemeal litigation.

The question whether the Commission should have been required by the district court to conduct further investigation and make more detailed findings does not, in our opinion, require review. The Commission is prepared to proceed in accordance with the terms of the remand. Accordingly, the district court's decision is in the nature of an interim ruling.

We suggest, in the light of these considerations, that the appeals do not present any substantial ques-

tion requiring determination at this time and that the Court should decline to note probable jurisdiction.[1]

Respectfully submitted,

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[1] The Commission does not concede that its order on the merits was erroneous and, in the event that probable jurisdiction should be noted, it reserves the right to argue that question.

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